IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1613

EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC.
MIDDLE ATLANTIC CONFERENCE
NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.
NEW ENGLAND MOTOR RATE BUREAU, INC.
NIAGARA FRONTIER TARIFF BUREAU, INC.
ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC.,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Of Counsel:

REA, CROSS & AUCHINCLOSS
700 World Center Building
918-16th Street, N.W.
Washington, D.C. 20006

BRYCE REA, JR.
DAVID H. COBURN
918-16th Street, N.W.
Washington, D.C. 20006
(202) 785-3700

Counsel for Petitioners

May 11, 1978

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TABLE OF CASES

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on February 21, 1978.

CITATION TO OPINIONS BELOW

The February 21, 1978 order of the Court of Appeals appears in Appendix A, but is not yet reported. The March 30, 1978 order of the Court of Appeals denying rehearing appears in Appendix B but is not reported. The March 19, 1974 Initial Report and Order of the Interstate Commerce Commission (Commission) in Ex Parte No. MC-77 (Sub-No. 1), *Restrictions on Service by Motor Common Carriers (Compliance Reports & Interpretations)* which the Court of Appeals upheld appears in Appendix C and is reported at 119 M.C.C. 691 (1974). The Report and Order of the Commission on reconsideration of that proceeding appears in Appendix D and is reported at 126 M.C.C. 303 (1977).

JURISDICTION

The judgment of the Court of Appeals was entered on February 21, 1978. The order of the Court of Appeals denying Petitioners' petition for rehearing was entered on March 30, 1978. This Court has jurisdiction under Section 2350(a) of Title 28 of the United States Code.

QUESTION PRESENTED

When enacting the Interstate Commerce Act, Congress specifically chose not to vest the Interstate Commerce Commission with authority to require the establishment of through routes among motor common carriers of property — i.e., arrangements between carriers for the continuous carriage of goods from points on the line of one carrier to points on the line of another carrier at rates embracing the entire movement. The question posed here is:

Whether the Commission exceeded its statutory jurisdiction in a manner specifically proscribed in *Thompson* v. *United*

States, 343 U.S. 549 (1952), when it established new through routes among motor common carriers under the guise of requiring that existing through routes be reasonable?

STATUTORY PROVISIONS

The statutory provisions involved in this case are cited below and set forth in Appendix E. They are:

The Interstate Commerce Act:

Section 15(3), 49 U.S.C. § 15(3)

Section 204(a)(1), 49 U.S.C. § 304(a)(1)

Section 216(a), 49 U.S.C. §316(a)

Section 216(c), 49 U.S.C. §316(c).

Regulations of the Interstate Commerce Commission:

49 C.F.R. §1307.27(k)(1)

STATEMENT OF FACTS

A through route is an arrangement whereby connecting carriers hold themselves out to perform continuous carriage of goods from an origin on the line of one to a destination on the line of the other. A joint rate is a single rate established jointly by the carriers party to a through route covering the carriage of goods from origin to destination and is the most common evidence of a through route arrangement. Through routes are also evidenced by the joint and several liability of each carrier for loss and damage to shipped goods.

Whereas the Interstate Commerce Act vests in the Commission authority to mandate through routes and joint rates among railroads, water carriers, and motor common carriers of passengers, Section 216(c) of the Act provides only that "Common carriers of property *may* establish through routes and joint rates, charges and classifications with other such carriers. . . ." Compare Sections 15(3), 216(a) and 307(d) of the Act, 49 U.S.C. §§ 15(3), 316(a), 907(d).

Employing the discretion vested in them by Section 216(c), carriers have, for the past 40 years, filed common tariffs which establish a nationwide network of through route service involving two carriers. The joint rates applied to this two-carrier service are pegged to the same level as the rates generally applied to the shipment of all commodities between all points in single-line service -i.e., the class rates. On the other hand, the common tariffs of the carriers generally do not provide for through routes and joint rates when the carriage of a shipment is performed by three or more carriers. Carriers will and do handle such traffic, but on the basis of a combination of single-line services and rates.

On March 3, 1970, the Interstate Commerce Commission issued its report and order in a proceeding styled Ex Parte No. MC-77, *Restrictions on Service by Motor Common Carriers,* 111 M.C.C. 151 (1970). In order to eliminate provisions in the tariffs of motor common carriers of property which the Commission believed limited ". . . service on small shipments and on traffic that either originates at or is destined to points in rural or relatively inaccessible areas," 111 M.C.C. 153, the Commission adopted a rule providing, in part, that:

> ". . . No provision may be published in tariffs, supplements, or revised pages which results in restricting service to less than the carrier's full operating authority or which exceed such authority." 49 C.F.R. § 1307.27(k)(1).

Without further notice, the Commission issued, on March 19, 1974, its first decision in Ex Parte No. MC-77 (Sub-No. 1), *Restrictions on Service by Motor Common Carriers (Compliance Reports and Interpretations),* 119 M.C.C. 691 (1974), wherein are set forth "additional actions" ordered by the Commission to achieve compliance with the above rule. The principal of those actions was an order requiring the cancellation of tariff provisions that limited the number of motor common carriers that participate in through routes and joint

rates. (Pet. App., p. C-14). As modified on reconsideration, the Commission required that carriers expand their through routes and joint rates to embrace hauls by three carriers. (Pet. App., pp. D-20, D-24).

Petitioners are associations through which motor common carriers of property collectively establish the rates and classifications published in their common tariffs pursuant to agreements approved by the Commission and thereby immunized from the antitrust laws under Section 5a of the Act. On May 5, 1977, Petitioners, acting on behalf of their carrier members, filed for judicial review of the Commission's order in the United States Court of Appeals for the Fourth Circuit. Jurisdiction in the Court of Appeals was founded on Section 2342(5) of Title 28 of the United States Code, 28 U.S.C. § 2342(5), which empowers United States Courts of Appeals to review Commission orders. Venue in that Court was founded on Section 2343 of Title 28 of the United States Code, 28 U.S.C. § 2343. On August 22, 1977, the Court of Appeals stayed the effectiveness of the Commission's order pending completion of judicial review.

Petitioners argued to the Court of Appeals, as they had to the Commission, that the order in Ex Parte No. MC-77 (Sub-No. 1) exceeded the Commission's statutory authority by mandating the establishment of through routes which do not now exist. By decision issued February 21, 1978, Senior Circuit Judge Bryan, speaking for a unanimous panel, affirmed the Commission's finding as follows:

> "As the Commission urges, it has not decreed through routes or joint rates; it has only obeyed the fiat of the Congress that it insist that those established by the carriers be reasonable, as witness the Act in Section 204(a)(1), 49 USC 304(a)(1):
>
> " '(a) It shall be the duty of the Commission— (1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may *establish reasonable requirements with respect to continuous and adequate services* . . . .' (Accent added)." (Pet. App., p. A-2).

By order filed March 30, 1978, the Court of Appeals denied the petition for rehearing and suggestion for rehearing en banc filed by Petitioners. (Pet. App., p. B-1). However, by order of April 11, 1978, the Court of Appeals stayed its mandate pending the filing of this petition.

REASONS FOR GRANTING THE WRIT

I

The Commission Contravened *Thompson* v. *United States* and Distorted the Interstate Commerce Act

The Commission's order "accomplish[es] indirectly what Congress has not chosen to give it authority to accomplish directly." *T.I.M.E., Inc.* v. *United States*, 559 U.S. 464 (1969). What the Commission cannot do directly is establish through routes among motor common carriers of property. But the Commission's order itself belies the contention that the Commission has not circumvented this limit on its authority.

Posit three carriers, A, B, and C, each holding certificates of public convenience and necessity from the Commission for the movement of commodities over routes embracing different origins and destinations. Carrier B shares a point of interchange with Carrier A and maintains a through route with Carrier A for the transportation of goods from origins on Carrier A's route to destinations on Carrier B's route at joint rates.[1] Carrier B shares another point of interchange with

[1] A point of interchange is no more than a point common to the lines of both carriers at which traffic is exchanged between them.

Carrier C, and likewise maintains a B-C through route. Posit further that each of the three carriers maintains a provision in their common tariff establishing through routes involving no more than two carriers. A typical provision reads as follows: "Unless otherwise specifically provided, joint routes will not apply for joint hauls via more than two carriers."

By ordering the substitution of "three" for "two" in this provision, the Commission established a through route not before available. It established a through route for the movement of traffic originating on Carrier A's line over Carrier B's line to a destination on Carrier C's line.

But, the Commission argues that it has not created this new through route and it hinges this conclusion on the proposition that carriers have taken the initial "affirmative action" of "voluntarily . . . entering into joint or interline arrangements" with one other carrier and "having made that choice, they are bound by rules of interpretation or administration that the Commission formulates." (Pet. App., p. D-15). The Commission thus argued to the Court of Appeals that the A-B-C through route can be "constructed" on the basis of the existing points of interchange named in the common tariffs which connect the routes of these three carriers. The Commission's order, it was urged to the Court of Appeals, merely makes this through route "operational."

The proposition that the Commission can exercise its regulatory authority by "constructing" through routes based on points of interchange already stands rejected by this Court as an "unwarranted distortion of the statutory pattern" governing the Commission's authority with respect to through routes. *Thompson* v. *United States,* 343 U.S. at 549, 559. Also see *Denver and Rio Grande West R. Co.* v. *Union Pac. R. Co.,* 351 U.S. 321 (1956). In *Thompson, supra,* the Missouri Pacific Railroad transported grain on its own lines from Lenora, Kansas, to Omaha and Kansas City, both about the same distance from Lenora. At Concordia, Kansas, a point between Lenora and

Omaha, its line connected with the Omaha Line of the Chicago Burlington & Quincy. The Omaha Grain Exchange complained to the Commission that it was being discriminated against because the rates from Lenora to Omaha were higher than the rates from Lenora to Kansas City. It asked the Commission to require the Missouri Pacific to reduce the rates. The Commission found that there was an existing through route between Lenora and Omaha over the lines of the Missouri Pacific and the Burlington, with an interchange at Concordia. It then found that the combination of local rates from Lenora to Concordia and from Concordia to Omaha were unreasonably high to the extent they exceeded the rates to Kansas City and ordered them reduced. By "constructing" this through route based on the physical interchange of the railroads, the Commission avoided the limit on its authority to establish through routes between railroads when such routes would result in a railroad short-hauling itself. See Section 15(4) of the Act.

Mr. Chief Justice Vinson, speaking for a unanimous Court, found that "the Commission's efforts to support its finding that a through route . . . already exists are inconsistent with the meaning of the term 'through route' as used in the Interstate Commerce Act." 343 U.S. at 560. Rather, he held that the test of a through route is whether carriers "hold themselves out as offering through transportation service." 343 U.S. at 557. Applying that test, Chief Justice Vinson found that "there [was] no evidence that any through transportation service [had] ever been offered from Lenora to Omaha via the Burlington . . ." and that:

> "[t]he fact that appellant's line connects with the Burlington at Concordia does not aid the Commission in proving the existence of a through route since the power to establish through routes . . . also presupposes such physical connection." 343 U.S. at 557-558.

Here, as in *Thompson,* the mere physical connection, the sharing of commonly designated points of interchanges be-

tween Carriers A, B, and C, does not evidence a through route. On the contrary, the designation of interchange points is no more than the process of naming points at which traffic is interchanged. Whether it is to be interchanged in through route service or in a combination of single-line service can only be determined with reference to other tariff provisions.

Here, as in *Thompson,* there is no evidence that the carriers "hold themselves out as offering" through transportation service via three lines. On the contrary, the tariff provisions ordered modified by the Commission dispositively prove that carriers have chosen not to "hold themselves out as offering" three-carrier through transportation service.

Here, as in *Thompson,* the Commission has avoided a limit on its statutory authority to establish through routes by concluding that through routes already exist. That conclusion failing the test set forth in *Thompson,* the order here warrants review on the ground that it marks a bold usurpation by the Commission of powers withheld by Congress.

The reliance by the Court of Appeals on the Commission's authority, derived from Section 204 of the Act and *McLean Trucking Co.* v. *United States,* 356 F. Supp. 349 (M.D. N.C. 1972) aff. 409 U.S. 1121 (1973), to regulate the reasonableness of carrier through route practices marks an unfortunate effort to justify the circumvention of the Act. Nothing in Section 204, which merely authorizes the Commission to regulate motor common carriers within "the limits of the regulatory system of the Act which it supplements," can authorize the exercise of regulatory authority withheld by Section 216(c). *American Trucking Ass'n.* v. *United States,* 344 U.S. 298, 313 (1953).

Nothing in the *McLean* case can justify the Commission's order.[2] The question there was whether the Commission's

[2] Oddly, the Court of Appeals found that *McLean* "distinguished explicitly and precisely the power of the carriers under Section 216(c) of the Act and the Commission's right of regulation by virtue of Section 304(a)(1) [204(a)(1)]." (Pet. App., p. A-3). In fact, *McLean* did not even address the Commission's authority under Section 204 of the Act.

explicit authority under Section 216(g) to suspend and investigate the reasonableness of newly proposed tariff provisions embraced authority to suspend and investigate a proposal to cancel a concededly existing through route voluntarily established under Section 216(c). The Court held that it did. That holding has no bearing on this case, for a holding that the Commission has authority to determine the reasonableness of existing through routes cannot be read to empower the Commission to require through routes to be established.

II

The Impact of the Commission's Statutory Excess is Substantial

The significance of the Commission's assumed power over railroad through routes in *Thompson* was substantial for it meant that ". . . Congress' insistence on protecting carriers from being required to short haul themselves could be evaded whenever the Commission chose to alter the form of its order . . . ." 343 U.S. at 559-560.

The logical conclusion of the Commission's theory here will result in no less an undermining of Congressional prerogatives. Congress denied the Commission authority to establish through routes among motor common carriers of property for reasons acknowledged by the Commission:

> ". . . The operation of such carriers differs in many important respects from railroad operation. Many of them render a specialized service in the transportation of a limited number of commodities; some of them operate over irregular routes between points within a territory, rather than over regular routes between specified points; and there is a striking lack of uniformity in the types of equipment they operate, in their financial responsibility, and in their ability to provide service. Undoubtedly, Congress legislated

with respect to motor common carriers of property in light of these well known facts and accordingly made it clear that such carriers were not required to establish joint rates and through routes." (*Hausman Steel Co.* v. *Seaboard Freight lines, Inc.*, 32 M.C.C. 31, 36 (1942).) Also see remarks of Senator Wheeler, 79th Cong. Rec. 5655 (1935).

By making "operational" through routes which motor common carriers of property have chosen not to make available, the Commission's order results in the precise problems Congress chose to avoid when it vested through route decisions in the hands of the carriers. Thus, carrier managerial discretion has been exercised for 40 years now in a manner which limits existing through routes to those which are economical and necessary. Carriers' class rates are based on the cost of carrying shipments in single-line service and in joint-line service by not more than two carriers. Carriers offer through route-joint rate service with due regard for the overriding fact that the transfer of a shipment between carriers increases the cost of carrying it from its origin to its destination. Revoke managerial discretion and replace it with Commission regulation establishing three-carrier through routes and the cost of service will increase without any corresponding increase in revenues.

Likewise, carriers have used their discretion to limit their through route arrangements to those carriers with which they are familiar — e.g., with financially solvent and responsible carriers. Revoke that discretion in favor of Commission regulation establishing three-carrier through routes and carriers will be forced to share joint and several liability for lost and damaged goods with other carriers of unknown or questionable responsibility.

The negative economic impact of three carrier hauls is incalculable. Jeopardized by the increased costs and exposure to liability which accompany the Commission's order are the approximately 25 percent of all carrier revenues currently

earned as a result of two-line hauls. The impact is incalculable in other respects too, for the Commission's assumption of authority to establish motor common carrier through routes foretells further regulatory excesses of the same kind. Indeed, the Commission's reliance in this case on the generalized grant of regulatory authority embodied in Section 204 of the Act leaves wholly undefined the boundaries of the Commission's powers. Only the intervention of this Court can restore the boundaries established by Congress.

PRAYER

Petitioners submit that the foregoing establishes the presence of "special and important" reasons for granting this petition.

Wherefore, Petitioners pray the Court to issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review its decision in this case.

Respectfully submitted,

BRYCE REA, JR.
DAVID H. COBURN
918 - 16th Street, N.W.
Washington, D.C. 20006
(202) 785-3700

Counsel for Petitioners

OF COUNSEL:

REA, CROSS & AUCHINCLOSS
700 World Center Building
918 - 16th Street, N.W.
Washington, D.C. 20006

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EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC.
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ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

PETITIONERS' APPENDIX

OF COUNSEL:

REA, CROSS & AUCHINCLOSS
700 World Center Building
918-16th Street, N.W.
Washington, D.C. 20006

BRYCE REA, JR.
JOHN R. BAGILEO
DAVID H. COBURN
918-16th Street, N.W.
Washington, D.C. 20006
(202) 785-3700

ROBERT E. BORN
1447 Peachtree Street, N.E.
Atlanta, GA 30309

Counsel for Petitioners

May 11, 1978

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APPENDIX A

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 77-1626

EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC., et al
Petitioners

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,
Respondents

On petition for review of an order of the Interstate Commerce Commission

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Argued December 7, 1977 **Decided February 21, 1978**

Before BRYAN, Senior Circuit Judge, WINTER and RUSSELL, Circuit Judges.

Bryce Rea, Jr. (John R. Bagileo, David H. Coburn; John S. Fessenden, Michael Gallagher, Robert G. Gawley, William E. Kenworthy, William W. Pugh, J. Alan Royal; Norman Powell, Joseph Wolonsky; Rea, Cross and Auchincloss on brief) for Petitioners; David Popowski, Attorney, Interstate Commerce Commission (John Shenefield, Assistant Attorney General; Robert B. Nicholson, Assistant Chief, Appellate Section, Antitrust Division; Robert Lewis Thompson, Attorney, Department of Justice; Mark L. Evans, General Counsel and Henri F. Rush, Associate General Counsel on brief) for Respondent; Steven J. Kalish (Daniel J. Sweeney, Belnap, McCarthy, Spencer, Sweeney & Harkaway on brief) for Intervenor-Respondents; (Robert E. Born, Born, May, Kohlman & Sawyer on brief) for Interventor Southern Motor Carriers Rate Conference, Inc.

Albert V. Bryan, Senior Circuit Judge:

Associations and tariff bureaus of interstate motor common carriers of property, petitioning for review, question the authority of the Interstate Commerce Commission to order that interline carriers' tariffs shall not limit through routes and joint class rates to less than three carriers, rather than to two as the carriers had done of their own accord. 28 USC 2321(a); 2342(5)-2348; Ex Parte No. MC77 (Sub. No. 1), 126 M.C.C. 303, 326 (January 19, 1977); 49 CFR 1307.27(k)(1).

The challenge is postulated on Section 216(c) of the Interstate Commerce Act, 49 USC 316(c). It permits *carriers* to "establish reasonable through routes and joint rates . . . with other such carriers. . . .", but gives no corresponding permission to the Commission. Hence, petitioners arraign the order as an unwarranted pretension by the ICC to undelegated jurisdiction. Besides their own reading of the terms and intendment of the statute, petitioners suggest, too, an implied joinder of the Commission in their view, by endeavoring, from time to time, though unsuccessfully, to have the Congress amend so as to confer this power upon it.

Answering, the Commission, with the intervenor-respondents, pleads, by way of confession and avoidance, that while not itself possessed of the power, the disputed order is not an arrogation of petitioners' prerogative, but rather the exertion in the public interest of its bounden oversight of the carriers in the exercise of their privilege.

Resolution of this controversy calls for a decision of law as well as an appraisal of the evidence justifying the application of this ruling. In both of these aspects our study confirms the soundness of the order now in review.

As the Commission urges, it has not decreed through routes or joint rates; it has only obeyed the fiat of the Congress that it insist that those established by the carriers be reasonable, as witness the Act in Section 204(a)(1), 49 USC 304(a)(1):

> "(a) It shall be the duty of the Commission—(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may *establish reasonable requirements with respect to continuous and adequate services, . . .*" (Accent added.)

Regarding the Commission's sphere vis-a-vis the exclusivity of the carriers' power over routes and rates, a three-judge court in McLean Trucking Co. v. United States, 346 FS 349 (MDN.C. 1972)

aff. 409 US 1121 (1973), distinguished explicitly and precisely the power of the carriers under Section 216(c) of the Act and the Commission's right of regulation by virtue of Section 304(a)(1). The Court accented that the Commission's function was to evaluate the routes and rates with an eye to "public convenience and necessity".*

The Commission has found that its instant restraint of the carrier's utilization of their powers, to originate routes and rates, is necessary to assure adequate availability of transportation service. This result was markedly dwelt upon in its last report, January 19, 1977, 126 MCC 322, footnote 12:

> "The position of the Commission in this respect arises from the showing concerning the problems of shippers located in rural areas, particularly when traffic is destined to other rural points, and from the showing concerning the trend toward compartmentalization of carrier operations. We would further observe in this respect, however, that while it is not a matter capable of objective proof, it is possible that in most instances traffic could move between virtually all points in the continental United States in operations involving interlining of no more than three common carriers. Thus, to the extent an interlining carrier maintains restrictions in its tariff limiting joint rate applicability to operations involving less carriers it is, in a sense, limiting a shipper's commercial activities in accordance with the territorial limits of its certificates and those of one other carrier, rather than allowing activities bounded only by the Nation's borders."

In fine, we see in the reasons and results of the assailed order as scrupulously expounded by the Commission throughout, no mistake of law or infirmity in evidential backing. "We do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of the regulations that the Commission promulgates, and

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* Incidentally, anent any adverse intimation from the Commission's non-success in having Congress amend, the Court observed in Amercian Trucking Association v. A.T. & S.F.R. Co., 387 US 397, 418 (1967):

> "The advocacy of legislation by an administrative agency—and even the assertion of the need for it to accomplish a desired result—is an unsure and unreliable, and not a highly desirable, guide to statutory construction. . . ."

we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported." U.S. v. Allegheny-Ludlum Steel, 406 US 742 at 749(1972).

In this area of consideration a multiple-judge court, in C-Line, Inc., et al. v. United States, 376 FS 1043, 1048 (DCR.I. 1974), reiterated with due authentication:

> "It is well settled that the scope of judicial review of an order of the Commission is limited. Such an order will be sustained if it is within the Commission's power, and its judgment rational and based upon substantial evidence."

Again, in Armored Carrier Corporation v. United States, 260 FS 612, 614 (EDNY 1966), aff'd 386 US 778, reh. denied 388 US 924, the Court laid down this prescript:

> "Absent pertinent authority, and since the Commission is the expert in the field of transportation, East Texas Motor Freight Lines, Inc. v. Frozen Foods Express, 1956, 351 U.S. 49, 76 S.Ct. 574, 100 L.Ed. 917, its views should be entitled to special consideration."

Dominant throughout our resolution upholding the Commission, is the thesis of the National Transportation Policy, 49 USC 1:

> "It is hereby declared to be the national transportation policy of the Congress . . . to promote . . . adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; . . . All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Overall, petitioners contend too, that the Commission precedent to its order did not comply with the demands of the Administrative Procedure Act, 5 USC 553 et seq. in rulemaking. To the contrary, we see it dutifully attentive to the requisites of the statute.

Finally, in our judgment the order in suit is valid for the reasons set forth *infra* and in the Report of the Commission on Further Consideration, Ex Parte No. MC-77 (Sub-No. 1) Restrictions on Service by Motor Common Carriers. (January 19, 1977).

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1626

EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC.
MIDDLE ATLANTIC CONFERENCE
NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.
NIAGARA FRONTIER TARIFF BUREAU, INC.
NEW ENGLAND MOTOR RATE BUREAU, INC.
ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC.,
Petitioners,

versus

INTERSTATE COMMERCE COMMISSION, UNITED STATES,
Respondent.

INDUSTRIAL TRAFFIC LEAGUE,
Intervenor.

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE AND THE DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,
Intervenors.

Order

(Filed March 30, 1978)

The petitioners' petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A poll of the court was requested, and in the poll a majority of the judges eligible to vote, voted to deny rehearing en banc.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

For the Court—By Direction.

/s/ WILLIAM K. SLATE, II
Clerk

APPENDIX C

EX PARTE NO MC-77 (SUB-NO 1)

RESTRICTIONS ON SERVICE BY MOTOR COMMON CARRIERS

(COMPLIANCE REPORTS AND INTERPRETATIONS)

Decided March 15, 1974

Upon investigation, regulation [49 CFR 1307.27(k) adopted in 111 M.C.C. 151 (1970)] requiring the tariffs of motor common carriers of property to conform strictly with such carriers' operating authorities in keeping with their fundamental common carrier obligations to serve the general public, construed. Proceeding discontinued.

John P. Connor, Robert G. Gawley, James T. Henry, F. H. Lynch, Jr., Donald E. Martin, James W. McFadden, Jr., G. D. Michalson, Milton A. Miller, J. A. Royal, Arthur L. Shipe, and *John Womack* for tariff association respondents.

REPORT OF THE COMMISSION

BY THE COMMISSION

The basic investigation and rulemaking proceeding in Ex Parte No. MC-77, *Restrictions on Service by Motor Common Carriers,* was instituted on this Commission's own motion to consider the adoption of an appropriate regulation designed to compel motor common carriers of property to meet their public responsibility to provide transportation service to the full extent of their operating authorities and abilities. The regulation adopted in our first report in that proceeding, 111 M.C.C. 151 (1970), is reproduced in the appendix to this report.

The *Restrictions* case thus represented one of this Commission's responses to the growing traffic selectivity being practiced by motor common carriers by means of self-imposed service limitations, in their tariffs or otherwise. It was there concluded that a rule requiring those motor common carriers engaged in interstate or foreign commerce subject to our jurisdiction to maintain appropriate tariffs conforming in scope to their operating authorities would be reasonable, necessary, and in the public interest. Initially,

the requirement was found to be reasonable inasmuch as it exacts of all motor common carriers the performance of only those operations for the very rendition of which they were granted their certificates of public convenience and necessity. The adopted regulation demands of them only that they fulfill their duties as common carriers to perform fully their certificated operations and represents a codification of well-established principles of carrier conduct.

That the rule was necessary and required by the public convenience and necessity were also deemed to be beyond question. The Ex Parte No. MC-77 examination had disclosed that because of an increasing tendency of motor common carriers of property to restrict their services selectively through various questionable manipulations of their tariffs, as well as other related practices, the full services contemplated by their certificates were not being offered to shippers. As a result, motor transport services, which ideally are to be equally available to all members of the general public, were found to be less adequate than they ought to be on a nationwide scale. In so curtailing their services, these carriers were, in effect, attempting to assume the duty of this Commission to determine if, and to what extent, their certificates should be limited under the Interstate Commerce Act. These self-imposed service limitations were accordingly held to be invalid, contrary to the very concept of common carriage, and in some measure responsible for such inadequate, uneconomical, and inefficient motor transportation services as had been found to exist. In furtherance of our duty to implement the national transportation policy and the provisions of the Interstate Commerce Act, this Commission, therefore, had no alternative but to conclude that the present and future public convenience and necessity required the adoption of an appropriate rule designed to reinforce the basic common carrier obligations of that segment of our motor transportation industry.

This Commission's report and order, cited above, required motor common carriers of property to bring those of their tariffs which failed to comply with the new regulation into conformity with that rule on or before June 1, 1970. That compliance date was later postponed until September 1, 1970, pursuant to the petition request jointly submitted by the Central and Southern Motor Freight Tariff Association, Inc., Central States Motor Freight Bureau, Inc., Eastern Central Motor Carriers Association, Inc., Maine Motor Rate Bureau, Middlewest Motor Freight Bureau, Inc., New England Motor Rate Bureau, Inc., Niagara Frontier Tariff Bureau, Inc., Southern Motor Carriers Rate Conference, and Southwestern Motor

Freight Bureau, Inc. By the same order entered May 28, 1970, all joint petitioners were required to report to us the actions they had taken to bring their tariffs, filed prior to April 17, 1970, into compliance with the adopted regulation. They were instructed to specify the type of restrictions which they proposed to delete, and those which in their opinion raised questions as to the need for deletion or modification pursuant to the said report and order. We here intend to explore those responses in some detail, to analyze their ramifications, and to develop whatever additional actions might be required by motor common carriers in order to achieve full compliance with the terms of our present regulation.

REPRESENTATIONS

The following is a summary of the reports received from the above rate bureaus in compliance with the order of May 28, 1970: Generally, the tariff associations have agreed to the deletion of most minimum-weight restrictions in tariffs filed on behalf of their members. On the other hand, most of the respondents assert that the decision in Ex Parte No. MC-77 does not require the elimination of tariff provisions which: (a) require the prepayment of freight charges to destination or point of interchange, (b) state that a rate applies only if the commodity involved is packaged to meet specific requirements, (c) provide that joint rates do not apply on shipments requiring a three-line haul, and (d) charge additional amounts for specific pickup and delivery services. Their separate positions will next be summarized.

Central and Southern Motor Freight Tariff Association, Incorporated, as background for its report, explains that the initiation of tariff changes lies with its individual motor carrier members for which it acts as agent, rather than with the association itself. It has, however, instituted a program to review tariffs published by its members and to notify them if any of their tariffs appear to be of the type proscribed by the involved rule or this Commission's decision in *National Furniture Traffic Conf.* v. *Assoc. Truck*, 332 I.C.C. 802, affirmed *sub nom.*, *Associated Truck Lines, Inc.*, v. *United States*, 304 F. Supp. 1094 (W.D. Mich. 1969), affirmed 397 U.S. 42 (1970). Subsequent to notification of the association's affected members, some carriers have either canceled certain tariffs or furnished information justifying the retention of the questionable tariffs. Others have simply failed to reply to the association or to take corrective measures. The association further expressed its intent to

determine by a certain date just what action it should take as to those carriers which failed to reply, but has not apprised us of its decision in that regard.

As examples of tariffs which its members proposed to delete, Central and Southern list those which provide that joint rates do not apply on less-than-truckload (LTL) shipments and shipments weighing less than a specified minimum weight, when such traffic is destined to certain named points. Also to be canceled were publications which stated that a carrier would not accept any LTL shipments to a specified point or points.

To be retained by Central and Southern's members were the following types of tariff provisions: those which specify that when combination rates are applicable, the publishing carrier will accept shipments from connecting carriers only when freight charges are prepaid to destination or to the point of interchange with other connecting carriers; those under which joint rates on truckload shipments or volume traffic moving in a specified direction will apply only when the publishing carrier is the one making delivery; those which specify that a rate on a specific commodity will apply only if it is packaged to meet specified requirements; and those which provide that joint rates will not apply on traffic involving more than a three-line haul.

The Central and Southern Association also enumerates several types of tariff provisions which it believes do not violate either the involved rule or the *National Furniture* decision, even though they may appear to do so on their face. First, it cites a tariff wherein a carrier states that when it participates in joint-line transportation, joint rates will not apply on shipments originating at certain named points. It deems this to be an acceptable provision inasmuch as the involved publishing carrier does not serve the named origins, which are served by carriers with which it maintains through joint-routing provisions, and thus does not restrict the publishing carrier's service. Further, the provision is said to leave the route open to all commodities and provide only that rates on shipments originating at certain points will be other than joint rates. Another type of tariff in this category is exemplified by a provision published in behalf of Central Motor Lines, Incorporated, which states that rates will not apply on cigarettes, cigars, and tobacco. Although it had not received a response to its notification from that carrier with regard to the above-cited provision, it believes that Central maintains an individual tariff which covers cigarettes, cigars, and tobacco, and that

the provision is, therefore, not a restriction on service.[1] As a third example, it points to a tariff provision wherein it is stated that rates will not apply on volume shipments of specified commodities, when transported from Athertonville, Ky., to Pekin, Ill. It explains that this tariff is maintained to permit a presumably lower, combination rate to apply on shipments which move through or are interlined or interchanged at Louisville, Ky., in transit from Athertonville to Pekin; and that such tariff provision is required in order to comply with this Commission's Tariff Circular Rule 4(i), 49 CFR 1307.28(i).

Central States Motor Freight Bureau, Inc., after reviewing all tariffs published by it in behalf of its member carriers, informed each carrier which maintained a provision or provisions appearing to violate the involved rule that it should either authorize the bureau to cancel such tariff or should show justification for its retention. Although this Commission's order in the lead proceeding stated that the reports to be made by petitioners should contain information about three separate categories of restrictions, the bureau states that it has found only two classes of provisions: those which appear to violate the rule, and those which do not.

It has included within the class of provisions which appear to violate the involved rule, tariffs which totally eliminate from the service offered by a carrier having authority to perform all of the excluded service: (a) specific commodities, (b) transportation to or from certain points, or (c) certain commodities only when transported to or from specific points. It also generally places all minimum-weight limitations in excess of 500 pounds within this category, as well as tariffs which specify mileage rates for distances which are beyond the scope of a carrier's authorized operation.

Not deemed by Central States to be in violation of the regulation are those tariff provisions which provide for the nonapplication of joint rates with regard to (1) certain commodities, (2) service to or from specific points, (3) multiple-line transportation involving certain named carriers or more than two carriers, (4) transportation which the carrier is authorized to perform in single-line service, or (5) a combination of the foregoing. Such provisions are said to result in the assessment of a combination of local rates if embraced in a class rate tariff, or if the provision is in a commodity tariff, in the application either of class rates or a combination of local rates. Also

[1] By letter of July 7, 1970, Central Motor Lines, Incorporated, advised this Commission that its rates for cigars, cigarettes, and tobacco are published in another tariff; that it believes the provisions of rule 4(g) of this Commission's Tariff Circular MF-3 [49 CFR 1307.28(g)] require the present restriction; and that the said restriction should not be canceled.

listed as acceptable provisions are those which (a) require the prepayment of freight charges on certain traffic, (b) set forth packaging requirements, (c) provide that some commodities will be transported only when palletized, containerized, and/or loaded and unloaded by shipper and consignees, respectively, (d) constitute pricing measures, such as pickup or delivery charges, (e) state that two carriers are to be treated as a single line, or (f) provide that commodity rather than class rates will apply only when the traffic is transported in certain types of equipment. It also believes that neither truckload minimum-weight restrictions on so-called exception or commodity rate traffic, nor minimum-weight restrictions which apply to the joint-line transportation of certain commodities only or to service between named points, and assess combination rates to traffic below that minimum weight, violate the rule adopted by this Commission. It argues that, although some acceptable restrictions may appear on their face to be violations of the regulation in question, the service excepted by that restriction may be covered in another tariff, and the restriction was probably published to comply with rule 4(g) of the Commission's tariff circular,[2] which provides that a carrier may not have duplicating or conflicting rates.

Eastern Central Motor Carrier Association, which acts as a publishing agent for its carrier members, apparently believes that certain minimum-weight restrictions are the only provisions which clearly violate the rule promulgated in Ex Parte No. MC-77. To bring about its members' compliance with that rule, it notified each carrier which maintains a minimum-weight limitation in Eastern Central's Rate Group Tariff 51, MF-I.C.C. A-321, that the association will cancel their respective restrictions unless it receives instructions to retain the provision. The association planned to publish the cancellation of all such weight limitations except those of the seven carriers which have requested retention in supplement 48 to its above-cited tariff. It is noteworthy that generally those seven carriers wish to retain those restrictions to the extent that they apply to joint-line transportation only.

Tariff restrictions which Eastern Central does not intend to delete include those which set forth packaging requirements or require the prepayment of freight charges on certain joint-line transportation, pricing provisions such as one which assesses an additional charge for pickup or delivery at a private residence, and those which provide for the nonapplication of joint rates if more than a specified number of carriers participate in the transportation.

[2]This reference should be to Rule 4(h), 49 CFR 1307.28(h).

The association states that varying viewpoints exist with regard to the propriety of provisions which proscribe one type of service but do not preclude an alternative type of service for the same traffic. As an example, it cites a provision to the effect that order-notify shipments will not be accepted, which provision was then the subject of a pending petition for investigation and declaratory order in Docket No. 35269.[3] Also deemed to be subject to controversy are publications canceling joint-rate arrangements. It mentions that while it may be thought by some that the application of combination rates is an acceptable alternative to joint rates, a similar provision was recently suspended (and ultimately canceled) in I. & S. Docket No. M-24035, *Combination Rates on Furniture via Eastern Express*.

Maine Motor Rate Bureau, after a review of all of its publications, concluded that the only objectionable provision was one which stated that perishable freight, tendered in shipments weighing less than 10,000 pounds, would not be accepted. It indicates that this item was to be canceled in its next regular supplement. It cites, as a restriction of a questionable nature, a provision which provides that rates will not apply on shipments to be delivered to private residences.

Middlewest Motor Freight Bureau, on instructions from its individual carrier members, has canceled or modified a sizable number of provisions, and was in the process of eliminating or changing additional limitations to bring its members' tariffs into compliance with Ex Parte No. MC-77. Examples of provisions which it has deleted or modified, or would delete or modify, are as follow: (1) tariffs which provide for the nonapplication of rates on named commodities only, (2) statements either that a carrier maintains no through routes, joint rates, or interchange arrangements with regard to specified commodities,[4] such as household goods, furniture, or personal effects, or that combination, rather than joint rates apply to such commodities, (3) while tariffs which cause rates on bent, cut-to-shape automobile glass to be assessed at 400 percent of the applicable first-class rate have been retained, similar provisions which also specify that the minimum charge for the transportation of

[3]This and related proceedings were later discontinued without prejudice to any different findings and conclusions that might be reached in Ex Parte No. 272, *C. O. D. and Freight-Collect Shipments*, subsequently decided, 343 I.C.C. 692 (July 16, 1973), and now pending on petitions for reconsideration.

[4]Apparently some member carriers had retained such provisions while others had either (a) revised their tariffs to state that charges would be assessed on the basis of a combination of rates, or (b) deleted only that portion of the tariff which states that the carrier maintained no through routes or interchange arrangements with regard to the service which is the subject matter of the tariff.

that commodity is based on a stated minimum weight have been deleted; (4) tariffs providing for the nonapplication of joint rates on LTL traffic, traffic moving to or from named points, or a combination of both limitations, have been deleted, however, those which only exclude from the application of joint rates, transportation from or to named points when more than a stated number of carriers participate in the carriage, have been retained; (5) tariffs stating that charges must be prepaid when combination rates apply due to another carrier's restriction against through rates; and (6) those which specify that local or joint rates from or to certain points will apply only on shipments on which charges are based on weights of a stated amount, such as 10,000 pounds or more, with such provisions applying sometimes only to named points or only when the publishing carrier is the originating or delivering carrier.

Middlewest lists as tariff provisions which it believes do not violate the involved rule, and which will be retained, those which condition the rendition of certain transportation, or the application of specified rates, on fulfillment of stated packaging or crating requirements, and tariff statements that joint rates will not apply to: (a) the transportation of certain commodities, (b) service to or from listed points, (c) joint service which involves more than a stated number of carriers, (d) shipments which are received from connecting carriers at listed points, (e) LTL shipments, (f) shipments which fail to meet a minimum-weight requirement, (g) shipments which the publishing carrier neither originates nor delivers, (h) transportation between points which the publishing carrier can serve directly, and (i) volume or truckload shipments of iron or steel articles. Many of the foregoing provisions which cause the nonapplication of joint rates provide for the assessment of combination rates which must be prepaid. Other provisions which Middlewest intended to retain included items which assess a higher class rating or higher rates on LTL traffic or on such specified commodities as glass or those which require temperature control, as well as those which exact a minimum charge based on 5,000 pounds for the transportation of radioactive materials.

The New England Motor Rate Bureau, Inc., informed all its member carriers of the new regulation, and urged them to search their tariffs for provisions which might violate the new rule, and to arrange to cancel any prohibited publications. Its legal department scrutinized the bureau's tariffs for proscribed restrictions and determined that the following classes of restrictions should be

deleted: (a) those which exclude certain commodities, (b) those which set minimum-weight requirements for service to or from named points, (c) joint rate or through route restrictions against traffic originating at or destined to named points, and (d) limitations which attempt to preclude service on certain types of traffic. The bureau advised those of its members which participated in such limitations to forward cancellation instructions, and approximately one-half of the carriers so notified authorized the immediate cancellation or amendment of the questioned provisions. Five other carriers disagreed with the bureau's analysis and interpretation of the new regulation, and requested retention of their provisions, which are exemplified by the following tariff restrictions: (a) carrier maintains no through routes, joint rates, or interchange arrangements on shipments of furniture, (b) shipments originating at or destined to named points will be subject to a minimum weight of 5,000 pounds, (c) joint-through rates will not apply on shipments from or to named points, and (d) rates applicable from or to named points will not apply on LTL traffic.

Niagara Frontier Tariff Bureau, Inc., as a result of its study, determined that there are six basic categories of tariff restrictions which come within the purview of the new regulation. Those categories of objectionable tariffs are as follow: provisions which limit service to shipments of a given weight; those which state that a carrier maintains no through routes, joint rates, or interchange arrangements on specific commodities; tariffs which restrict the application of joint rates on the basis of the type of commodities to be carried or the points to be served; higher than normal minimum-charge provisions on specific commodities; minimum-rate restrictions; and those which limit the application of joint rates to joint-line hauls in which more than a specified number of carriers participate. Inasmuch as its affected member carriers indicated that they did not believe that the last four types of the above-described restrictions are proscribed by the rule, the bureau only contemplated the elimination of the first two types of provisions unless the carriers requested deletion of additional publications. To exemplify tariffs which would be retained unless carriers request that they be modified or deleted, it cited provisions which fix minimum charges for LTL shipments or which exact higher class rates for such traffic.

Southern Motor Carriers Rate Conference examined its members' tariffs to determine whether any provisions were contrary either to

the new rule or to this Commission's decision in the *National Furniture* case, *supra*. It thereafter informed carriers that steps should be taken to bring all tariffs into compliance, and a sizable number of tariff cancellations have been effected. It believes that the following types of provisions are proscribed by the recently adopted regulation: those which state that a carrier handles shipments only if they (a) meet a stated minimum weight, (b) are composed of named commodities or move in a specified direction, or (c) consist of traffic which is of a value not exceeding a stated sum per pound.

As illustrations of tariffs which it does not find violative of the involved regulation, it mentions publications which set forth packaging requirements, assess an additional nominal charge on single shipments which weigh less than 500 pounds, or are rate-setting measures which require the payment of fees such as minimum charges or arbitraries. It also includes within this classification, publications which restrict the application of joint rates to specified traffic and direct that a combination of rates apply to the traffic excluded by the restriction, if the differentiation in treatment is based on something other than commodity selectivity. The conference also believes that it is proper to restrict the application of joint rates to traffic which involves less than a stated number of carriers.

The conference lists several types of tariff provisions which it believes raise questions regarding conformity with the involved rule. Included within this category are provisions which on their face appear to be proscribed service restrictions, but which have been published not with the intent to limit service but because there is a corresponding service restriction in the carrier's operating authority or because it is necessary to avoid conflict between the conference publication and the carrier's own individual tariff. Illustrative of such provisions are conference publications which exclude a named member carrier from participation in the conference tariff with regard to the single-line transportation of stated commodities or of traffic moving to or from designated points. It also places within this third group of provisions, those which state that published rates will apply on certain commodities only when they are palletized or in containers, and then only when loaded by the consignor and unloaded by the consignees. It cites this last example because it believes it to be a question of fact whether such provisions restrict service.

Southwestern Motor Freight Bureau, Inc., corresponded with its members to notify them about the Ex Parte No. MC-77 regulation adopted by this Commission, and to urge them to check their restrictions for possible violations and to take corrective measures. In response to this notification, 13 carriers requested cancellation of certain tariff provisions. Subsequently, the bureau examined other provisions which seemed to violate the new rule and notified 18 carriers that certain of their tariffs appeared to be contrary to that regulation and that their respective provisions would be canceled unless that affected carrier issued instructions otherwise. Of the 10 carriers which responded to the notification, 8 authorized amendment of their items for the purpose of compliance and 2 requested retention of their respective provisions. The bureau intended to contact the eight carriers which failed to respond before taking further action with regard to their respective items.

Middle Atlantic Conference, although not required to do so by this Commission's order of May 28, 1970, has filed a report which summarizes its compliance efforts and its views regarding various categories of tariffs. It classified as provisions which have been or would be, deleted or modified to bring them into compliance with the rule promulgated in Ex Parte No. MC-77, those which restrict the application of joint rates, or subject joint-line traffic to minimum-weight rate bases unless the publishing carrier is the originating carrier, with these limitations sometimes applying only to certain service points; those which confine direct service to shipments which meet a stated minimum weight or, alternatively, require the payment of charges based on minimum weights ranging from 1,000 to 20,000 pounds, with these limitations sometimes applying only to specified points; those which condition acceptance of shipments of certain commodities on a shipper's acceptance of a released value; those which specify unequivocally that shipments which fail to meet a stated minimum weight of 1,000 pounds or more, will not be accepted; and, those which subject shipments of less than a stated volume to additional pickup and delivery charges.

As examples of tariff provisions which it deems should be retained, it cites those which assess additional charges on shipments picked up or delivered on holidays, weekends, or at other than regular business hours by shipper request, unless a shipment meets a stated minimum weight; those which specify the day or days on which pickups and deliveries are made or condition service upon the prepayment of freight charges; provisions which state that a carrier will not accept c.o.d. or order-notify shipments, or those

which are destined to consignees such as traveling shows or circuses; and tariff statements that a carrier will not accept shipments which move under customs bonds requiring government inspection, fail to meet packaging requirements, or require protective service or special equipment. Also categorized as acceptable provisions are tariffs which specify that joint rates will not apply to shipments of less than a stated weight when they move to or from specified points or to joint transportation which involves more than a stated number of carriers, generally two or three carriers, or to such other specified traffic as explosives. It also classifies as acceptable, tariffs which exact minimum charges based on specified weights such as 500 pounds or assess an additional sum for shipments which do not meet a designated minimum weight. Also placed within this category are tariff restrictions published to avoid contradiction or duplication of other provisions maintained by a carrier. As final examples of tariffs which it intends to keep, it cites those which assess additional charges or contain rates based on a stated minimum rate with regard to traffic requiring the use of special equipment, special services or handling, such as the exclusive use and subsequent cleaning and disinfecting of vehicles, or special facilities.

Tariff restrictions, which may duplicate restrictions or limitations embraced in a carrier's operating authority, are the only provisions which the conference believes raise questions with regard to conformity with the rule adopted in Ex Parte No. MC-77.

Discussion and Conclusions

It is the duty of this Commission pursuant to section 204(a)(1) of the Interstate Commerce Act, and the national transportation policy declared by the Congress,[5] to regulate common carriers by

[5] 49 U.S.C. preceding sections 1, 301, 901, and 1001. That policy reads as follows:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and (footnote continued on next page)

motor vehicle and the services they provide in the public interest. This duty obligates us to reexamine continuously the services being rendered by motor common carriers in order to assure the public that such licensed carriers are providing the safe, adequate, economical, efficient services contemplated by their certificates and the statute. When it is determined that a carrier, or group of carriers, is not providing the complete service authorized and required by its certificate, we are empowered by section 208(a) of the act to attach to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by this Commission under section 204(a)(1) and (6).

As we stated in *Removal of Truckload Lot Restrictions*, 106 M.C.C. 455 (1968), affirmed *sub nom., Regular Common Carrier Conference* v. *United States*, 307 F. Supp. 941 (D.C. 1969), the power to attach terms, conditions, and limitations to certificates conferred by section 208(a) is a broad one; the standards are only that they must be reasonable, and that they must be either required by the public convenience and necessity, or necessary to implement any requirements established under section 204(a)(1) and (6). Section 208(a) of the act is extremely comprehensive and was specifically adopted to enable this Commission to require motor common carriers to live up to their public calling. Its full sweep has not yet been tested.[6] This Commission encourages the use of through routes and joint rates which, in the public interest, promote the transportation of small shipments and create a unified motor carrier system. We, therefore, urge motor common carriers voluntarily to enter into such agreements, which will expand the

(footnote 5 continued)

> to encourage fair wages and equitable working conditions,—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

[6] Cf. the *National Furniture* case, *supra*, and the recent decision of the statutory three-judge District Court in civil action No. 4419, *Chemical Leaman Tank Lines, Inc.* v. *United States*, F. Supp. (D. Del. 1973).

network of transport services that motor carriers can offer their customers.[7]

We are in the instant proceeding called upon to determine whether certain tariff limitations retained, or proposed to be retained, in carriers' tariffs are in conflict with the spirit and letter of the regulation previously adopted in Ex Parte No. MC-77. It is our considered opinion that all tariff limitations which, by their express terms, tend to discourage the use of joint rates are violative of this regulation. Such limitations unduly restrict the availability of flexible and efficient services offered by certificated motor carriers and are not in keeping with the public interest, convenience, or necessity as found in our earlier report. We are not requiring the initiation by motor common carriers of joint rates, which matter is the subject of proposed legislation submitted to the Congress. Suffice to say that we are, instead simply determining that our present regulation, set forth in the appendix, generally prohibits restrictions in tariffs against the use or application of joint rates. Section 216(c) of the act itself states that common carriers by motor vehicle may establish joint rates. We believe that a tariff restriction arbitrarily forbidding the establishment of joint rates tends to impede a carrier's choice of entering into joint rates or not. Such limitations represent a negative approach to a problem requiring positive solutions. To achieve our goal of a unified motor common carrier system, the ability to enter joint rates must be available and not automatically foreclosed by tariff limitations. We, therefore, find not to be in conformity with the spirit and letter of our decision in Ex Parte No. MC-77, subject to the further explanations set forth below,[8] tariff limitations which have no foundation in the underlying certificated authority held by the carrier and which provide that rates do not apply on:

(a) shipments involving or requiring a two- or three-line haul (or more than any specific number of lines);
(b) shipments originating at or destined to certain named points;

[7] In this context, it is noted that a motor common carrier seeking the cancellation of joint rates and through routes published in its tariffs has the burden, under section 216(g) of the act, of establishing that the cancellation is just and reasonable. See *Interchange Between McLean Trucking and Manning*, 340 I.C.C. 38 (1971), affirmed *sub nom. McLean Trucking Company v. United States*, 346 F. Supp. 349 (M.D. N.C. 1972), affirmed 409 U.S. 1121 (1973).

[8] The listed tariff limitations would not be in conflict with the regulation promulgated in Ex Parte No. MC-77 if they are being utilized by an individual carrier to exclude from a bureau tariff specific rates which are covered by a separately filed tariff. Because the separately filed tariff provides for the service excluded in the bureau tariff, there is no actual limitation on services offered by the carrier. The same thing is true where a lower total charge is provided by a restriction against the application of the published joint rates, leaving a combination of rates to apply.

(c) shipments received from or delivered to *named* connecting carriers;
(d) shipments of named commodities (such as explosives or size-and-weight commodities);
(e) less-than-truckload shipments;
(f) shipments which fail to meet unreasonable minimum weight requirements;
(g) shipments not delivered by the publishing carrier; and
(h) shipments which fail to meet unreasonable packaging requirements.

Carriers should be apprised, too, that the prohibited limitation in (a) above does not represent an invitation on our part for them to publish only single-line rates, to enter into joint arrangements with only named connecting carriers, or to resort to general rate-stops to eliminate multiple-carrier routes. If such attempts should be made, and the adequacy of available motor common carrier service declines as a result, this Commission would likely have no alternative but to take appropriate action under section 208(a) of the act to require the rendition of all services found to be required by the present or future public convenience and necessity and within the scope of the certificate issued by this Commission to the carrier. The above tariff limitations will not be unlawful if (a) a motor carrier's authority is restricted against such service, (b) such restriction is included within a Commission-approved pooling agreement, or (c) such limitation conforms with the requirements of an outstanding effective order or orders of this Commission as, for example, that in *Oilfield Equipment To and Between the Southwest*, 300 I.C.C. 409, 305 I.C.C. 425, 306 I.C.C. 365, 313 I.C.C. 577, 106 M.C.C. 298, and 332 I.C.C. 688.

It also bears mentioning here that certain of the tariff restrictions not deleted by the responding tariff associations require greater investigation than that which may be accomplished on the present record. Studies of these matters have either been recently concluded or are now under way in separate proceedings. Thus, the question of the validity of tariff provisions limiting service to commodities not requiring protective service is at issue in No. MC-C-7599, Travenol Laboratories, Inc., Petition for Investigation—Protective Service. The validity of minimum-weight limitations not eliminated from tariffs is being evaluated in No. MC-C-7750, Investigation of Minimum Weight Charges. The validity of provisions involving shipper loading and unloading are present in No. 35054, Unloading Restrictions on Meats & Packinghouse Products, and No. 35874, Argo-Collier Truck Lines, Inc., Et Al.—Petition for Declaratory Order—Loading/Unloading Contracts. And the validity of provisions requiring the prepayment of freight

charges to destination or to point of interchange is being considered in Ex Parte No. 272, *C.O.D. and Freight-Collect Shipments, supra,* footnote 3, now pending on petitions for reconsideration.

On this record, tariff provisions setting forth specific and reasonable additional charges for pickup and delivery at residences or on holidays and weekends or during off-business hours do not appear to be violative of the subject regulation because, so long as they are in fact just, reasonable, and otherwise lawful, these pricing measures do not illegally restrict the type of service a carrier is obligated by its certificate to perform. Tariff provisions declining to provide service unless a commodity is packaged to meet specific requirements, unless certain types of equipment are utilized, or unless the commodity is palletized or containerized, are not valid tariff restrictions. These provisions usually are intended to provide incentives for shippers properly to package or protect their goods for safe and expeditious handling in transit. This may be accomplished, however, by the publication of appropriate pricing measures which avoid the use of a blanket restriction against such services that we have found objectionable herein. Such pricing measures, if reasonable, would hold out service at reduced rates for properly packaged commodities, and thus would neither restrict the movement of those commodities nor unduly discourage the shipment of such commodities in the same manner as blanket prohibitions against handling any nonconforming packaged item discourages its movement.

Tariff limitations which conform to a carrier's operating authority[9] are lawful and need not be deleted in accordance with the regulation promulgated in Ex Parte No. MC-77. Other examples include tariff provisions specifying just, reasonable, and otherwise lawful charges for special handling required by shippers that normally is not the duty of the carrier to provide. A provision stating, however, that a motor carrier will not handle shipments moving under customs bonds requiring government inspection would be improper where it restricts service to less than a carrier's full operating authority. Provisions of this type should be deleted immediately.

We have received many informal complaints in recent years regarding the diminution of services available following an acquisition or merger of one motor common carrier by or into

[9]Restrictions to service at designated plantsites or on shipments originating at or destined to certain named points are pertinent examples. See *Fox-Smythe Transp. Co. Extension—Oklahoma*, 106 M.C.C. 1 (1967), for other appropriate service restrictions imposed on operating authorities issued by this Commission.

another. It appears that in certain instances when an acquisition or merger is approved by this Commission the consolidated carrier continues to provide adequate services on attractive traffic but either intentionally or unintentionally allows its services on the less profitable or less desirable traffic to deteriorate. Such actions by the surviving carrier following an acquisition or consolidation are unlawful. These carriers are required to provide the full scope of services authorized by their certificates whether those certificates are obtained through a section 207 licensing application or by way of merger or acquisition. The regulation which is the subject of this report, therefore, is equally applicable to certificated authority obtained pursuant to either course of action, and it will be so interpreted and enforced.

We appreciate the cooperation and assistance of all carriers as well as the replicant tariff associations in this proceeding. Such cooperation, as well as that of shippers and other users of interstate motor transportation subject to this Commission's regulatory jurisdiction, is essential to the development of a meaningful provision designed to develop and maintain an economically sound public transportation system adequate to meet the needs of our Nation's commerce and defense. These associations should now see that their members' tariffs conform to the full scope of the latters' authorized operations subject to the interpretations made in this report, and they should informally apprise this Commission of any refusals to comply on the part of their member motor carriers. This is especially true today when, despite the current energy crisis, the public convenience and necessity must continue to be served by the regulated motor common carrier industry. The promulgation of the regulations here approved will, we firmly believe, help prevent present and anticipated fuel shortages from being used to enable motor common carriers to pick and choose the traffic and the customers they serve. Tariffs should be brought into compliance with the rule of construction set forth in this report on or before June 1, 1974.

FINDINGS

We find that the regulation codified at 49 CFR 1307.27(k) should be construed and interpreted in the manner set forth in this report and that such construction and interpretation are reasonable and necessary to the effective enforcement of the provisions of part II of the Interstate Commerce Act, as amended, and are required by the present and future public convenience and necessity; that this decision is not a major Federal action significantly affecting the

quality of the human environment within the meaning of the National Environmental Policy Act of 1969; and that this proceeding should be discontinued. An order discontinuing this proceeding will be entered.

COMMISSIONER BREWER, concurring:

While I am in accord with the views expressed in this report, I would broaden the scope of our inquiry for the purpose of making findings herein on the lawfulness of motor carrier tariff restrictions which provide for total forbearance from all loading and unloading service, rather than deferring resolution of that matter to other, pending proceedings.

APPENDIX

The Regulation

49 CFR 1307.27(k) *Operating authority.*—(1) Tariffs must contain only rates, charges, and related provisions that cover services in strict conformity with each carrier's operating authority. No provision may be published in tariffs, supplements, or revised pages which results in restricting service to less than the carrier's full operating authority or which exceeds such authority. Tariff publications containing such provisions are subject to rejection or suspension for investigation.

(2) Tariffs and supplements thereto filed prior to the effective date of section 1307.27(k)(1) which do not conform to those requirements shall be brought into conformity therewith on or before June 1, 1970.

APPENDIX D

M-12865

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. MC-77 (SUB-NO. 1)

RESTRICTIONS ON SERVICE BY MOTOR COMMON CARRIERS
(COMPLIANCE REPORTS AND INTERPRETATIONS)

Decided January 19, 1977

(1) Upon further consideration findings in above-captioned proceeding (printed at 119 M.C.C. 691) modified. Regulation (49 CFR 1307.27(k) adopted in 111 M.C.C. 151 (1970)) requiring that tariffs of motor common carriers of property conform strictly with such carriers operating authorities in keeping with their fundamental obligation to serve the general public construed. Compliance date set by which tariffs required to conform with regulation as interpreted herein.
(2) Petitions for reconsideration, except to the extent granted herein, denied.
(3) Verified statements submitted in conjunction with petitions herein, and transcript of informal conference accepted into the record.

Robert T. Born, John P. Connor, Don R. Devine, Joseph E. Durrin, John S. Fessenden, Michael Gallagher, Robert G. Gawley, James T. Henry, Gerald W. Hess, William E. Kenworthy, F. H. Lynch, Jr., Donald E. Martin, Herman Matthei, John W. McFadden, Jr., G. D. Michalson, Milton A. Miller, Norman Powell, Bryce Rea, Jr., J. Alan Royal, Arthur L. Shipe, J. Anthony Terilla, and *John Womack* for tariff association respondents.

Walter Harwood and *Marshall Kragen* for motor carrier respondents.

R. Edwin Brady, Homer S. Carpenter, Keith G. O'Brien, and *Roland Rice,* for Regular Common Carrier Conference of American Trucking Associations, Inc.

John M. Cleary, John F. Doneland, Myron B. Smith, and *Daniel J. Sweeney* for replicant shippers and shipper associations.

Peter Q. Nyce, for the United States Department of Defense.

REPORT OF THE COMMISSION ON FURTHER CONSIDERATION

BY THE COMMISSION:

This proceeding involves the interpretation of a regulation formulated in our decision in Ex Parte No. MC-77, entitled

Restrictions on Service by Motor Common Carriers, 111 M.C.C. 151 (1970).[1] Our prior report herein, printed at 119 M.C.C. 691, involved a consideration of the lawfulness of various restrictions commonly employed by carriers in their published tariffs. In that report carriers were required to remove from their tariffs certain restrictions found to be inconsistent with this regulation. The compliance date has been postponed indefinitely.

Petitions for reconsideration of our prior report in Ex Parte No. MC-77 (Sub-No. 1) have been filed individually by: Central & Southern Motor Freight Tariff Association, Incorporated; Middle Atlantic Conference (a tariff publishing agent); Middlewest Motor Freight Bureau; The New England Motor Rate Bureau, Inc.; Regular Common Carrier Conference of the American Trucking Associations, Inc. (a trade association); Rocky Mountain Motor Tariff Bureau; and Southern Motor Carriers Rate Conference, Inc.; and jointly by Central States Motor Freight Bureau, Inc., and The Eastern Central Motor Carriers Association, Inc. The petitions of several of the above-named tariff bureaus are accompanied by supporting verified statements submitted for filing by one or a number of their respective member motor carriers. Various shipper organizations have filed replies. In separately filed pleadings respondents Eastern Central, Southern Motor Carriers Rate Conference, and Central and Southern requested that this matter be assigned for oral argument before the Commission. This latter relief was denied in a "Notice of Informal Conference and Order," served October 25, 1974, which provided instead for an informal conference to be held November 15, 1974, at Washington, D.C., which would be presided over by an Administrative Law Judge and would be attended by Commission staff personnel.

In this report it will be our purpose to afford further consideration to the premises upon which our prior decision is based and to determine whether a different course of action may be warranted with respect to the matters considered therein. The need for this further analysis arises, we believe, from the seriousness of the various contentions raised in the petitions described above, and the verified statements which accompany them. The petitions and replies thereto, as well as the informal conference have afforded

[1] This regulation, which has been codified at 49 CFR 1307.27(k) *Operating Authority* provides in pertinent part that "* * * Tariffs must contain only rates, charges, and related provisions that cover services in strict conformity with each carrier's operating authority. No provision may be published in tariffs, supplements, or revised pages which results in restricting service to less than the carrier's full operating authority or which exceeds such authority * * *"

petitioners an opportunity to elaborate on their arguments relative to our prior decision, and permitted shippers and allied interests opposing their position to register a response thereto. The attached order will include appropriate language reopening the present record for acceptance of the transcript of the informal conference and the verified statements accompanying the petitions listed above, and the representations made therein will be evaluated in this report. This approach will enable us to more expeditiously dispose of the issues presented here while insuring compliance with procedural requirements for the holding of further proceedings. Before addressing the arguments of the parties and the merits of this case, though, brief consideration is warranted of the historical context in which this matter has developed.

HISTORICAL BACKGROUND

In general, the sequence of events culminating in the entry of the decision in 119 M.C.C. 691, may be measured from April 9, 1969. This was the date of publication in the Federal Register of the order initiating the rulemaking proceeding in Ex Parte No. MC-77. Written representations of carrier and shipper interests in response to this notice were considered at length in the decision at 111 M.C.C. 151, wherein the proposed regulation was adopted.

Our stated purpose in promulgating this rule was to alleviate the increasing difficulty experienced by shippers in obtaining service for the transportation of small, less-than-truckload (LTL) quantity shipments, because of limitations in carrier tariffs on the handling of such traffic. While shipper groups and governmental bodies which filed pleadings in support of the proposed regulation listed a number of tariff provisions which, in their opinion, hindered the movement of the involved traffic, the decision at 111 M.C.C. 151 specifically analyzed the lawfulness of only so-called "minimum weight" restrictions. Upon finding that such restrictions were unlawful and without foundation in a carrier's underlying authority, and do not bear any apparent relationship to revenue requirements, this Commission established June 1, 1970, as a compliance date by which objectionable provisions were to be removed from motor carrier tariffs. On the petition of a number of respondent tariff bureaus, this compliance date was postponed to September 1, 1970. The order granting the postponement included a specific requirement that the petitioners report to us the actions taken by them to bring their tariffs, or those of member carriers, which were

filed prior to April 17, 1970, into compliance with the involved regulation, and they were further required to specify the types of restrictions which they proposed to delete, and those which in their opinion raised questions as to the need for deletion or modification pursuant to the said report and order.

Reports filed by these organizations in response to the postponement order have received individual, in-depth, analysis in the initial report in the instant proceeding (119 M.C.C. 691) which need not be repeated here. Generally, though, the position taken by these parties is that while the considered regulation requires them to remove or to cause to be removed from their publications minimum weight restrictions specifically considered in the report in the lead proceeding, other restrictions not found unlawful by unqualified language in that report may be retained. In our prior decision in the instant proceeding, we announced that we were unable to concur in the position evinced by respondents in this regard. On this basis we proceeded to evaluate the impact of a number of restrictive provisions, commonly maintained in tariffs, relative to the performance of interline operations which provisions we found to be inconsistent with the policy underlying the involved regulation.

A summary of the various tariff restrictions analyzed and found to be unlawful appears at pages 704 and 705 of the decision in 119 M.C.C. 691, *supra*. This list includes (with certain qualifications) those limitations on service or on the application of rates which are without foundation in a carrier's underlying certificate and

*** [W]hich provide that [single-factor through-] rates do not apply on:

(a) shipments involving or requiring a two- or three-line haul (or more than any specific number of lines);
(b) shipments originating at or destined to certain named points;
(c) shipments received from or delivered to *named* connecting carriers;
(d) shipments of named commodities (such as explosives or size-and-weight articles);
(e) less-than-truckload shipments;
(f) shipments which fail to meet unreasonable minimum weight requirements;
(g) shipments not delivered by the publishing carrier; and
(h) shipments which fail to meet unreasonable packaging requirements.

The prior report further noted that carriers should not attempt to limit service by publishing only single-line rates, or to circumvent the above-described prohibitions by other methods. The contentions of the parties on petition challenging our action are set forth below.

CONTENTIONS OF THE PARTIES

Arguments posed in the considered pleadings and at the informal conference assail our prior decision herein on essentially three grounds. The first is that this proceeding in both its initiation and its findings fails to conform with required procedural formalities. The second is that it represents an exercise of authority that is beyond our statutory mandate. The third is that compliance with its terms would be so costly and complex as to render its implementation impractical and, in all probability, counterproductive. Various arguments have been raised in support of these allegations. Contentions of respondents questioning the procedural correctness of our actions are as follows: (1) that we have failed to comply with the requirements of section 4 of the Administrative Procedure Act (5 U.S.C. 553)[2] in our processing of this proceeding; (2) that the manner in which the prior report herein has been entered violates fundamental "due process" rights guaranteed in the United States Constitution; and (3) that consideration of the environmental implications of the proposed action was insufficient to satisfy the requirements of the National Environmental Policy Act of 1969. These deficiencies, it is asserted, warrant at very least the withdrawal of our prior decision and the reinstitution of this proceeding.

Most significant of the arguments challenging our fundamental authority to interpret the involved regulation concern the findings regarding tariff provisions listed under headings (a), (b), (c), and (g) above.[3] Petitioners collectively submit in their pleadings and at the informal conference that the prohibition against such restrictions in carrier tariffs evidences an intention on the part of this Commission

[2]Except in certain specified situations, section 4 (5 U.S.C. 553) requires an agency (1) to publish notice of proposed legislative rules in the Federal Register at least 30 days before their adoption, and (2) to invite representations during that time from interested parties relative to the issues involved. The issuance of the prior report in the instant proceeding was preceded neither by a publication of notice nor a solicitation of representations by parties affected.

[3]In the pleadings here under consideration only the Regular Common Carrier Conference voices specific objections to the inclusion of the remaining tariff provisions in the list of restrictions found to be unlawful in our prior report. It asserts that it is unnecessarily repetitive to find restrictions such as those set forth under headings (d) and (e) to be within the scope of the considered regulation inasmuch as they have been the subject of prior proceedings in *National Furniture Traffic Conf.* v. *Assoc. Truck.*, 332 I.C.C. 802, affirmed *sub nom., Associated Truck Lines, Inc.* v. *United States*, 304 F. Supp. 1094 (W.D. Mich. 1969), affirmed 397 U.S. 42 (1970), and *Removal of Truckload Lot Restrictions*, 106 M.C.C. 455 (1968), affirmed *sub nom., Regular Common Carrier Conference* v. *United States*, 307 F. Supp. 941 (D.D.C. 1969), respectively. As regards the provisions under headings (f) and (h), it submits that insufficient guidelines have been established in our prior report to enable removal of such provisions from carrier tariffs in compliance therewith. The merits of these contentions will be considered subsequently in this report.

either to require transportation firms to institute so-called "open routing" policies, or to revise their method of publishing tariffs to identify specific routes by which traffic will move. If the former of these results is intended, they assert that this agency is without authority to compel carriers to participate in interline traffic with respect to which they have not voluntarily entered concurrences.[4] In a similar vein certain respondents argue that to the extent such restrictions are employed to limit a carrier's participation in the handling of joint-line traffic, our action herein constitutes an unlawful interference with the valid exercise of managerial discretion and an interference in their right to condition contractual commitments.[5] Petitioners further submit that the provisions of section 217(a) of the act empowering this Commission to compel modification of tariff format have not been complied with insofar as this decision requires such action. Finally, it is contended by a number of petitioners and carriers participating in this proceeding that restrictions such as those mentioned above are, in fact, rate-setting measures, the lawfulness of which this Commission is required to consider on a case-by-case basis by reason of the terms of section 216(e) of the act and related provisions, which allegedly render improper the general, rulemaking approach utilized here.

As has been indicated earlier, practical objections to our prior decision which have been raised at the informal conference and in the pleadings here under consideration generally consist of complaints that it would be difficult to conform tariffs with the requirements of our report, and that higher prices and reduced availability of transportation service would result. The first of these categories of arguments is based on the presumption that the considered restrictions cannot be simply removed from tariffs, and

[4]The statutory provision on which petitioners rely is section 216(c) of the act which, in pertinent part, provides that "* * * Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; * * *" [emphasis added].

[5]Statements made at the informal conference by parties opposing our prior decision attempt to justify the considered tariff restrictions on the basis that such provisions are frequently utilized to preclude the tender of interline traffic which would inject imbalance into a carrier's operations or to avoid the performance of interline service with a carrier that is financially unsound. Thus, it is asserted that management's flexibility to deal with serious operational problems would be significantly reduced as a result of our action herein. As regards the freedom to contract issue, it is argued that the foregoing provisions are imposed in tariffs simply as a means of expressing the agreement of parties entering into interline arrangements. It is therefore asserted that our prohibition against inclusion of the considered restrictions in tariffs deprives concurring carriers of the right to condition their participation in joint-line operations in their best interests (such as by agreeing that traffic will not be tendered for movement at through rates to any other carrier or carriers).

that it would be necessary as a result of our decision herein (at least with respect to rate bureau tariffs) to publish guides specifically describing each route over which traffic could move between any given combination of points embraced within the scope of a tariff. It is asserted that this approach would be much more cumbersome than the present method of setting forth rates between all embraced points and indicating by means of exceptions the extent to which carriers participate in them. Furthermore, it is alleged that conversion at least of rate bureau publications would involve tremendous cost and result in tariffs so voluminous as to be virtually incomprehensible.

To exemplify their assertions that our prior decision would cause the price of transportation service to increase, while at the same time reducing its availability, respondents point out that commodity rates, established as a result of negotiations between a carrier and a specific shipper or group of shippers, are frequently not compensatory if the involved traffic moves in joint-line operations. Therefore, if this decision is intended to prevent carriers from restricting the applicability of such rates to this type of service, it is submitted that it could have a severe adverse effect on the industry. Similarly, the parties contend that, if so-called "open routing" is required, traffic in general will in all probability move with substantially greater circuity than at present, and at increased cost. Also having an effect on carrier revenues would be the alleged inability of transportation firms to protect themselves from being "short-hauled," that is, they are apprehensive that they will be required to accept interlined traffic at a point near the ultimate destination instead of one further away—thus affording them a shorter distance and less revenue over which to absorb terminal handling costs. Another pricing consequence said to result from this decision is that if traffic is required to move at published single-factor rates regardless of the number of carriers involved in the movement of a given shipment, increased terminal handling may result in decreased efficiency and eventually in an increase in general rate levels (which assertedly anticipate only minimum handling as presently formulated). As a final matter parties opposing our prior decision argue that if carriers are precluded from restricting their participation in joint-line operations, they may be discouraged from forming new concurrences and establishing new through routes, thus inhibiting the future growth and improvement of the national transportation system.

Shipper organizations, which have filed replies to the considered petitions, argue in general terms that the action taken in this proceeding is legally correct both in its procedural and substantive aspects, and will be of benefit to the shipping public. They assert in their pleadings and at the informal conference that a very real need exists for action by the Commission to stem the trend by motor carriers to impose limitations on joint-line operations and they submit that the tariff provisions under consideration play a significant part in reducing the availability of such service. Their latter position was supported at the informal conference by representatives of small, localized carriers who indicate that the imposition of restrictions on the applicability of through rates in the tariffs of line-haul carriers has had a significant adverse impact on their ability to handle joint-line traffic. This situation, these parties aver, has been further aggravated in recent years by the increasingly frequent acquisition of carriers with whom they previously interlined by large carriers with restrictive tariff provisions that have the effect of terminating outstanding interchange arrangements. In these circumstances, the considered carriers believe our action here to be appropriate and necessary.

The shippers and small carriers supporting our prior report have replied to certain of the contentions set forth above regarding the lawfulness and practicality of our prior decision. For example, they counter assertions by petitioners that the considered provisions are imposed to express the contractual agreements of participants in concurrences by arguing that in their collective experiences such terms show up in tariffs generally as a result of unilateral carrier action. Shipper groups in particular, also aver that the anticipated, destabilizing effects of a decision requiring the removal of limitations on the provision of joint-line service are greatly exaggerated. They submit that even if compliance problems do arise it should be possible to modify our present requirements without changing the central purpose and effect of our decision (as, for example, by permitting the retention of restrictions where necessary to prevent circuity, or to prohibit the participation of an unreasonable number of carriers in a given through movement). Accordingly they assert that the petitions should be rejected and the decision printed at 119 M.C.C. 691 affirmed.

Discussion and Conclusions

Certain assertions appearing in the foregoing petitions for reconsideration raise a general question regarding the scope of the adoped

regulation. In the introductory section of our prior report in this proceeding we noted that the adoption of the regulation at 49 CFR 1307.27(k) was prompted by the increasing tendency of motor common carriers of property, as demonstrated in Ex Parte No. MC-77, to restrict selectively their operations through tariff manipulations and other means in such a way as to offer shippers service less extensive than that contemplated in their operating authority. Because of the disruptive effects of these practices on the regulatory process, and their erosive impact on the level of service available nationwide, our response thereto was the formulation of a regulation which, in essence, reinforces the basic obligation of motor common carriers. In this light, it is readily apparent that the application of the considered regulation was not intended to be limited merely to those restrictions found unlawful by the specific language of the report but was intended to apply to any tariff provision which restricts service to operations less extensive than those which the motor carrier is authorized to perform. Thus, contrary to the contentions of various respondents, if the self-imposed tariff provisions considered in this proceeding have such an effect, we believe they may be found within the purview of the foregoing regulation.

Also meriting recognition at this point is the fact that the instant proceeding does not represent the first time this Commission has taken notice of the impact on shippers of the restrictions considered herein, and particularly of those which limit the availability of joint-line transportation service. As was observed earlier in this report, the representations submitted in support of the proposed regulation in the lead docket included reference to numrous tariff provisions felt by shippers to limit the quantity of service available to them. In our report in 111 M.C.C. 151, *supra*, at p. 157, we noted with respect to these representations that:

> Of extreme concern to many shippers are tariff restrictions whereby carriers, although certificated to do so, either provide no service whatever to or from certain points or refuse to accept interline traffic to specified points, often irrespective of the size of the tendered shipment. Some carriers, rather than totally excluding such service through their tariffs, assertedly discourage shippers from requesting transportation by conditioning acceptance of certain traffic upon payment of a higher class rate than is customarily applied to the tendered commodities, particularly if the traffic fails to meet minimum weight standards or is moving to or from a rural area.
>
> While the above-described practices are said to accompany both multiline and single-line carriage, the statements submitted by shippers indicate that the resultant problems encountered in joint-line transportation are more aggravated, far-reaching, and numerous than those experienced in single-line service.***

It was then suggested by shippers that these problems could best be remedied if we would compel motor common carriers to establish through routes and joint rates with other such carriers. In response to this suggestion we indicated that in our opinion, "• • • [U]nless and until we are given such power through the amendment of section 216(c) of the Interstate Commerce Act by congressional legislation, we may not compel motor carriers of property to initiate these arrangements." (L. C. 174.)[6] In view of this impediment, and because our principal concern in that proceeding was directed toward the impact of so-called "minimum weight" restrictions we declined to take action with respect to limitations on the performance of joint-line service. Continued monitoring by this Commission of increasing problems encountered by small volume shippers (particularly those located in rural areas) and the absence of congressional action to modify the statutory authority of this agency have moved us to consider alternative approaches to minimizing these service deficiencies without compelling carriers to enter concurrences establishing through routes and joint rates. Our prior report in the instant proceeding includes several expressions regarding our intentions in this respect; therefore, to the extent the instant petitions object to our decision in 119 M.C.C. 691, on substantive legal grounds they may be characterized as essentially questioning the consistency of the action taken in this decision with such stated objectives. Before addressing these substantive matters, however, it is necessary to consider petitioners' contentions that this Commission has not complied with certain fundamental procedural requirements.

I. Procedural Issues

Of the various procedural issues raised on petition, consideration is first warranted of the question of the applicability of the notice requirements of section 4 of the Administrative Procedure Act (cf. footnote 2, *supra*) to this proceeding. Our first decision in this sub-numbered proceeding was entered without prior publication of notice or a solicitation of comments with respect to the matters involved because of specific language in section 4 of the APA (5 U.S.C. 553(b)), excepting from such requirements agency action in-

[6]On May 6, 1975, the Commission submitted a number of legislative proposals to the 94th Congress, including a proposed amendment of section 216 of the act which would authorize the Commission to require joint rates and through routes between motor common carriers. Similar legislation probably will be submitted to the 95th Congress.

terpreting an existing regulation. Petitioners recognize that we have characterized our action herein as being interpretive in nature; however, they contend that the effects of this decision are such as to nevertheless render applicable the notice and comment provisions of the APA.

It is well established that courts will, on review of regulatory action, look beyond the label applied to a proceeding and find compliance with the foregoing requirements to be necessary if the decision in question is one having a "substantial impact" on the parties or industry to which it is directed. Cf. *Akron, Canton & Youngstown R. Co.* v. *United States*, 470 F. Supp. 1231 (D. Md. 1974); *Continental Oil Company* v. *Burns*, 317 F. Supp. 194, 197 (D.Del. 1970); and, *Pharmaceutical Manufacturers Assn.* v. *Finch*, 307 F. Supp. 858, 863 (D.Del. 1970). In the cited decisions the significance of the impact of agency decisions was evaluated on the basis of the following considerations: (1) the complexity and pervasiveness of the rules issued, (2) the drastic changes effected in existing laws by the rules, (3) the degree of retroactivity and its impact, and (4) the confusion and controversy engendered by practical difficulties of compliance with the new rules. On appraising the effects of our prior decision in light of these criteria it becomes apparent that in certain respects it represents action more "substantive" than "interpretive" in nature. Having so recognized, however, we hasten to add that in our opinion circumstances are present here which sufficiently distinguish this proceeding from those referred to above as to render inconsequential our having failed to publish notice prior to the entry of the initial report at 119 M.C.C. 691.

Of the various circumstances forming the basis for the position asserted in the preceding paragraph, the first is that this proceeding does not constitute an unannounced effort to deal with transportation problems not previously addressed, but rather is a culmination of action taken in an earlier proceeding. All of the respondents herein were before the Commission in the lead proceeding in this docket, and submitted representation relative to the question of the need for action on the proliferation of service restrictions in carrier tariffs. Our report in 119 M.C.C. 691 is essentially devoted to the evaluation of the compliance reports submitted pursuant to the orders entered in our decision in Ex Parte No. MC-77 (the correctness of which evaluation has not been challenged

here in any significant respect), and our rulings regarding the validity of the involved restrictions are framed in response to these representations. In addition to the foregoing, respondents have identified anticipated compliance difficulties and interpretive problems arising from these determinations in their pleadings and at the informal conference, while opposing interests have been afforded an opportunity to appear and state their position on the issues involved.[7] Thus, it is unlikely were this proceeding to be terminated and then reinstituted in conformity with the notice requirements of the APA that representations, issues, or parties, would differ to any extent from those already of record, and the end result of such action would only be further postponement of the resolution of serious problems relating to the availability of common carrier service. For these reasons, we believe that the processing of this proceeding has been conducted in substantial conformity with the policies underlying the notice requirements of the Administrative Procedure Act and that petitioners' arguments asserting noncompliance with the letter of this statute are without merit.

As was noted earlier in this report, petitioners also contend that the manner in which the prior report was entered violates fundamental "due process" rights guaranteed in the United States Constitution. Their position in this respect is essentially that because of the lapse of time between the filing of their reports in compliance with the terms of the decision in Ex Parte No. MC-77 and the initiation of this proceeding, they have been unfairly surprised by our action. The proposition underlying their arguments is that mere passage of time between different stages of an administrative proceeding may result in a deprivation of rights. No decisional precedents are cited supporting such a principle and we are unable to agree that there is merit to their considered assertions in this regard. Our decision herein is a direct outgrowth of reports submitted by these parties in conformity with the order in Ex Parte No. MC-77. Therein, respondents were asked, *inter alia*, to identify

[7] It is recognized that procedural deficiencies arising from the absence of prior notice of Commission action were found to invalidate subsequent agency proceedings in the decision in *Akron, Canton & Youngstown R. Co., supra*. That matter, however, came before the reviewing court after disposition by the Commission of petitions for reconsideration, which action necessarily confined our consideration to legal questions involved in the case. Here, further proceedings have been held upon the filing of petitions, thus affording respondents an opportunity to present their views supporting or opposing the merits of our considered action and this report is directed toward evaluating the record as so enlarged. Because of this procedure our prior decision can be characterized as the substantial equivalent of a notice of proposed agency action such as is contemplated by the Administrative Procedure Act with the present decision comprising, with respect to the initial report, final agency action considering all legal and factual issues raised by the parties.

those tariff provisions which raised questions as to whether modification was necessary. Certainly it is more than reasonable for respondents to have anticipated that their questions would be answered.

Arguments concerning the alleged failure of this Commission to consider sufficiently the environmental impact of this proceeding stem from our having determined in the body of our prior report, "*** that this is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969; ***" (NEPA). Petitioners contend this finding is erroneous, citing myriad hypothetical examples of how this decision could require more circuitous operations and have other adverse environmental implications. Because of the nature and seriousness of these assertions, the Commission has prepared an independent evaluation of the effect that this proceeding would have on the environment. In a document entitled "Environmental Threshold Assessment Survey" which was served in conjunction with an order entered herein on October 24, 1974, a conclusion was arrived at consistent with the determination in the prior report with respect to the involved matters. Parties were afforded 15 days from the date of service of that order to comment and the responses received are considered in a "Supplemental Environmental Threshold Assessment Survey," which is attached as an appendix to this report. It is there concluded that no circumstances have been shown which would warrant reaching a result with respect to environmental issues different from that stated in our prior decision. Recommendations embraced in this latter survey have, however, been weighed in our further consideration of this proceeding and where practicable have been integrated into our decision. It is felt that by employing these procedures our determination as to whether this proceeding constitutes a major Federal action is in full compliance with the requirements of NEPA, and renders groundless the pertinent arguments of petitioners. See *Hanly* v. *Kleindienst*, 471 F. 2d 823 (2d. Cir. 1972), cert. den. 412 U. S. 908 (1973); and *Harlem Valley Transp. Assn.* v. *Stafford*, 500 F. 2d. 328 (2d. Cir. 1974). See also, *Aberdeen & Rockfish Railroad Co.* v. *Students Challenging Regulatory Agency Procedures*, 422 U.S. 289.

II. Substantive Legal Issues

In interpreting the regulation codified at 49 CFR 1307.27(k) as prohibiting restrictions relating to the transportation of interline

traffic, this Commission has acted pursuant to authority granted in section 208(a) of the Interstate Commerce Act. The latter provision empowers this agency to attach to the exercise of the privileges granted by a carrier's certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by this Commission under section 204(a)(1) and (6). Section 204(a)(1), in turn, makes it the duty of this Commission "To regulate common carriers by motor vehicles" and to that end we may establish reasonable requirements with respect to continuous and adequate service. Section 204(a)(6) requires us "To administer, execute, and enforce all provisions" of part II of the act, and "to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedures for such administration***."

Although the scope of this Commission's authority under section 208(a) remains, yet to be fully explored it is well recognized as a general principle that our rulemaking power is geared to and bounded by the limits of the regulatory system of the act which it supplements. See also *American Trucking Assns.* v. *United States,* 344 U.S. 298, 313 (1953); and *Chemical Leaman Tank Lines, Inc.* v. *United States,* 368 F. Supp. 925, 932 (D. Del. 1973). As we observed in our prior report in the instant proceeding (at page 703), with respect to the authority granted in section 208(a) (footnote references omitted):

> ***[This] power *** is a broad one; the standards are only that [such conditions] must be reasonable, and that they must be either required by the public convenience and necessity, or necessary to implement any requirements established under section 204(a)(1) and (6). Section 208(a) of the act is extremely comprehensive and was specifically adopted to enable this Commission to require motor common carriers to live up to their public calling. Its full sweep has not yet been tested. ***

Notwithstanding all of this broad authority to implement the act, respondents contend that section 216(c) limits our power to act in these circumstances. Section 216(c), as quoted in footnote 4, is the section that allows motor carriers to publish tariffs that provide for joint-line service with carriers of the same or a different mode. Respondents submit that because it assertedly would require them to initiate "open-routing" policies, our prior decision herein is tantamount to an administrative amendment of section 216(c) of the act, which is beyond our jurisdiction. Respondents claim that the

right granted them in section 216(c) is permissive, not mandatory. We do not disagree that the section is permissive. This Commission cannot force motor carriers to enter into interline arrangements. It has been held since early in the history of motor carrier regulation that this Commission in the exercise of its power under the considered section of the statute may not expressly or by implication nullify another specific provision of the act. Cf. *Southwest Missouri R. Co. Common Carrier Application,* 4 M.C.C. 582 (1938); *Smith Bros. Revocation of Certificate,* 33 M.C.C. 465, 471 (1942). We have no intention of disturbing that principle.

Here, however, the carriers have voluntarily moved beyond the point of permissiveness by entering into joint or interline arrangements. In fact, they have exercised their option and have taken an affirmative action by choosing a particular course of conduct, i.e., engaging in joint-line operations. Having willingly made that choice, they are bound by rules of interpretation and administration that the Commission formulates. The carriers are free to choose whether or not to initiate interline service. The Commission, however, has the power to interpret the act and prescribe rules designed to implement the objectives of Congress. If we are to implement congressional objectives, the act must be interpreted as containing necessary provisions which permit the Commission, while confirming all privileges and rights guaranteed by the statute, to lay the foundations of a consistent transportation system in accordance with a symmetrical plan in the public interest. *McCracken* v. *United States,* 47 F. Supp. 444 (D. Oreg. 1942).

Insofar as this proceeding relates to operations pursuant to 216(c) its aim is essentially one of preventing abuse by carriers of the discretion afforded them by this provision.[8] The authority of the Commission to impose limitations on such operations notwithstanding the permissive terminology of this section of the act has been clearly recognized in prior regulatory proceedings. Thus, in *National Furniture Traffic Conf.* v. *Assoc. Truck,* 332 I.C.C. 802 (1968), aff'd. *sub nom. Associated Truck Lines, Inc.* v. *United States,* 304 F. Supp. 1094 (N.D. Mich. 1969), aff'd. 397 U.S. 42 (1970), it was held that nothing in the legislative history of section 216(c) confers on carriers the freedom to establish a scheme of through routes and joint rates which is selective as to a particular

[8] In discussing this particular section, the following comment was made by Congressman Martin (79 Cong. Rec. 12695): "Mr. Chairman, I want to call attention to the further language in this section. First, it says they 'may establish through rates and joint rates,' and second, if they do, they 'must' establish just and reasonable 'regulations and practices' in connection therewith ***."

class of traffic. Similarly in *Interchange Between McLean Trucking and Manning*, 340 I.C.C. 38 (1971), aff'd. *sub nom. McLean Trucking Company* v. *United States*, 346 F. Supp. 349 (N.D.N.C. 1972), aff'd. *per curiam* 409 U.S. 1121 (1973), it is recognized that once concurrences have been established the involved carriers have a certain obligation to continue them in existence.

To use an analogous situation, carriers make a willing choice to apply for authority, and by so doing, they recognize the authority of the Commission to interpret and administer the requirements of the act. Similarly, by filing a joint line tariff, each carrier accepts the right of the Commission to prescribe the proper parameters of the tariff publication. Our decision here does not contemplate "open routing"; rather, we have merely reviewed a limited number of carrier rate practices and found that they constitute an abuse of the broad discretion that they have with regard to the filing of tariffs. We view this result as being essential to the free flow of commerce at reasonable rates and a necessary protection to the small shipper.

We hold, therefore, that the Commission has the power to impose reasonable conditions on the services offered by carriers who choose to exercise their right to engage in interline operations.

There remain for consideration, in addition to the substantial practical questions which have been raised as to whether the action taken herein will ultimately benefit the public interest, contentions that statutory provisions relating to rate setting and tariff format require case-by-case consideration of the matters addressed on a general basis in this proceeding. The appropriateness of our utilizing the format of a rulemaking, as opposed to an adjudicatory, proceeding in interpreting the regulation at 49 CFR 1307.27(k) has received substantial anticipatory analysis in our decision in Ex Parte No. MC-77, *supra*, and in our earlier report in this proceeding as well. We believe our prior conclusions with regard to these issues amply dispose of petitioners' contentions, and in the interest of avoiding unduly lengthening this report a detailed discussion of their pertinent arguments will be dispensed with. Our analysis of these matters in the prior proceedings referred to is therefore incorporated by reference into this report. On the other hand, it would appear that the assertions of respondents regarding the possible adverse practical ramifications rising from the prohibition of the considered restrictions, while possibly overemphasized in the interest of advocacy, are of sufficient merit to warrant further consideration of an elaboration on certain of the holdings in our prior report.

III. Analysis on Further Consideration

The history of the regulation under consideration demonstrates that its purpose is to preclude carriers from appropriating to themselves the authority to determine what traffic otherwise within the scope of their authority will move over their respective lines. Our opposition to the exercise of such carrier selectivity arises from the fundamental requirement of the national transportation policy[9] that we promote the development of a *national transportation system*. It is apparent that to the extent a carrier arbitrarily inhibits the free flow of goods in interstate or foreign commerce[10] (by hindering the movement of small shipments, of traffic moving in interline service, or of commodities which are undesirable because of other characteristics), our efforts in promoting this objective are frustrated.

The record in this proceeding demonstrates rather clearly that the tariff provisions considered in our earlier report are being imposed with increasing frequency to render single-factor, through-rates inapplicable to multiline motor carrier operations. Respondents nevertheless assert in their pleadings as they did at the informal conference that their actions in this regard are not service limitations violating the policy expressed in the regulation at 49 CFR 1307.27(k), and, therefore, are not subject to consideration in this proceeding. They argue that the considered rules in carrier tariffs merely reflect the higher cost of providing joint-line service and are necessary to render such operations compensatory. On evaluating these representations we conclude that the imposition of restrictive limitations on the multiline applicability of *commodity* rates, negotiated between a carrier and shipper, result from cost

[9]The statement of this policy appears in 49 U.S.C. *preceding* sections 1, 301, 901, and 1001. It describes various considerations prompting the enactment of the Interstate Commerce Act for our guidance in its administration, and it identifies the ultimate objective of this legislation as being that of:

> * * *[D]eveloping, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of commerce of the United States, of the Postal Service, and of the national defense * * *.

[10]Restrictions against multiline applicability of commodity rates (other than so-called "column commodity" rates which are structured much like class rates) are not felt to have such an inhibiting effect on the movement of shipments. This is because such rates have as their purpose the *stimulation* of traffic and in most instances would not be compensatory in joint-line carrier operations. Carriers are, however, advised to review their practices regarding the publication of such rates to determine whether they may be identified other than through the use of restrictive terminology.

considerations in most instances. If we require removal of limitations on commodity rates, it is clear that carriers would have to raise their rates. For this reason we are convinced that it is necessary to allow the retention of the involved provisions with respect to such rates subject to the reservations appearing in footnote 10, above. As regards class rates, however, we believe a different determination is warranted and that we must prohibit multiline restrictions. When through traffic becomes subject to a multiline restriction, the shipper must pay a combination of local rates, which become applicable when the through rate becomes inoperative. The combination of local rates, however, includes compensation for ancillary operations such as the pickup and delivery of traffic, relative to each segment of the combined rate which would apply to a given movement. Thus, the resulting charges are, in most instances so prohibitive as to discourage the tender of traffic by affected shippers. Obviously a valid question arises from this situation as to whether a carrier's interest is limited solely to obtaining adequate compensation when it adopts a tariff rule stating in essence that the only rate at which it will transport a shipment is one at which that traffic cannot move. It was precisely because of this "embargo effect" that unreasonable minimum weight restrictions were held in the *Restrictions* case, *supra,* to evidence an intent by carriers to "pick and choose" the traffic they would transport and it is the possibility that the provisions considered here may be, and frequently are, adopted specifically to avoid traffic that we believe it proper to evaluate their propriety in light of the above regulation.

The record in this proceeding indicates that the impact of traffic selectivity on interline service is particularly felt in areas distant from urban centers, and is acute where shippers so situated have available the service of only short-haul motor carriers. This is because of the proportionately greater reliance by shippers in these regions on multiline movement of traffic. There has also become apparent, however, an increasing tendency even with respect to traffic moving between commercial points where single-line service may be theoretically available[11] toward specialization of carrier activities, with pick-up service being provided by a feeder carrier, cross-country service being performed by a line-haul carrier, and delivery service being handled by a local carrier operating in the vicinity of the destination point. Efforts of this nature to rationalize

[11]See, *e.g., P. C. White Truck Line, Inc., Ext., Atlanta, Ga.,* 120 M.C.C. 824, 845-46 (1974).

carrier operations in the interest of efficiency would also appear to be greatly hampered by self-imposed carrier limitations on the availability of joint-line service. It is toward these problems that we believe our primary attention should be directed here.

It goes without saying that our prior report requiring the removal of the involved restrictions should have the salutory effect (at least insofar as it relates to other than commodity rates) of limiting considerably the opportunity for the exercise of traffic selectivity in the context of multiline operations. This approach also has the benefit of being relatively definite and certain—although not without giving rise to various interpretive questions. The definiteness of this "broad brush" solution, however, has been alleged by respondents to limit considerably the flexibility of carriers and their publishing agents in meeting practical situations with which they are faced in their day-to-day operations. In a recent decision in *Travenol Laboratories, Inc., Petition for Invest.,* 121 M.C.C. 588 (1975), at pages 616 and 617, we specifically recognized that while the legal duty of a common carrier to provide reasonably continuous and adequate service approaches that of being absolute, it is not without its exceptions. In this light, a fine-tuning of our interpretation of the involved regulation which would allow a limited retention of certain of the involved tariff restrictions would not necessarily be improper even if such action inadvertently were to have the effect of allowing the continuance of some limitations on service availability. The merits of the arguments raised by respondents in their pleadings and at the informal conference regarding the need to retain the individual provisions involved herein will be considered below with this in mind.

The most strenuous arguments against the rulings in our prior report are those asserting that a need exists for allowing motor common carriers to maintain tariff provisions which limit the *number* of participants in a through route at joint rates (restrictions such as those appearing under heading (a) in the list of tariff provisions found unlawful at pages 704 and 705 of our prior report herein). If we were to require that all such restrictions be removed from tariffs, it would be necessary for carriers either to revise completely the format of their publications in an attempt to set forth specific routes by which traffic could move, or to increase drastically general rate levels to allow for the participation of an indeterminate number of carriers in the movement of a given shipment. The costs to both carriers and the public which would result from a decision requiring such action would be virtually incalculable.

While the foregoing considerations militate against our requiring carriers to provide service which is virtually unlimited as to the number of participants in through routes at joint rates, the record herein reflects that excessive limitations on service availability do result from the maintenance of restrictions against the applicability of through rates to operations involving more than two carriers, and that shippers should have available at least three-line joint-line service for the efficient movement of their traffic.[12] By requiring carriers only to lessen the stringency of present restrictions on the number of carriers which may participate in the movement of traffic at through rates, it would not appear that the cost of performing joint-line operations would so increase as to necessitate a rise in the general level of class rates as presently established. Likewise, if experience pursuant to such operations does demonstrate aggregate higher costs for participating carriers, they would in all probability not be such as to necessitate incrementally significant rate increases in comparison with the benefits resulting from the broader availability of joint-line service. A decision requiring such modification of extremely restricted tariffs in no way contravenes rights conferred on carriers by the act. Accordingly, we conclude on further consideration that restrictions against the applicability of joint rates to operations involving more than two carriers are contrary to the regulation at 49 CFR 1307.27(k), and that motor common carriers will be required prior to the compliance date set forth below to modify such restrictions to permit the transportation of traffic at through rates by at least three interlining carriers. This determination should limit substantially the opportunities for the exercise of traffic selectivity while avoiding possible adverse side-effects.

As indicated earlier the parties also contend that we should not require the removal of those restrictions set forth under headings (b), (c), and (g), of the list of tariff provisions found unlawful in our

[12]The position of the Commission in this respect arises from the showing concerning the problems of shippers located in rural areas, particularly when traffic is destined to other rural points, and from the showing concerning the trend toward compartmentalization of carrier operations. We would further observe in this respect, however, that while it is not a matter capable of objective proof, it is possible that in most instances traffic could move between virtually all points in the continental United States in operations involving interlining of no more than three common carriers. Thus, to the extent an interlining carrier maintains restrictions in its tariff limiting joint rate applicability to operations involving less carriers it is, in a sense, limiting a shipper's commercial activities in accordance with the territorial limits of its certificates and those of one other carrier, rather than allowing activities bounded only by the Nation's borders. The considered tariff restrictions may, therefore, be considered as evincing the exercise of traffic selectivity from this perspective as well as those set forth earlier in this report.

prior report in this proceeding.[13] Their position with respect to these provisions is based on the various applications to which such terminology may assertedly be subject, as for example, the enforcement of the terms of an interline concurrence framed in such a way as to enable a carrier to balance its operations in the interest of fuel economy, or to prevent a carrier's being short-hauled on its own line. It is difficult to conceive of a situation, however, where a restriction against the application of joint rates to " *** shipments not delivered by the publishing carrier; ***" (as set forth under (g)) could have any purpose (unless required by the specific language of a carrier's certificate) other than to avoid the transportation of traffic otherwise within the scope of its operating authority. Provisions of this nature will, therefore, be required to be removed from tariffs by the compliance date as subsequently established herein.

On the other hand, we believe that respondents offer sound arguments as to why restrictions in (b) and (c) should not be interpreted as being included in the regulation. Cancellation of the originating at and destined to type of restriction would permit and even require inefficient and uneconomical transportation services. For example, a carrier authorized to serve two points directly should not be required to interline freight, and thus dilute its revenues. The limitation in (c) above helps protect a carrier from having to deal with another carrier that is not financially sound.

It must here be emphasized that our determination relative to (b) and (c) above is not intended as an indication that their imposition is in all instances proper. It is readily apparent that these types of limitations may be subject, in any given circumstance, to being employed for purposes inconsistent with the regulation under interpretation. Rather, our decision is a recognition of the fact that severe disruption of tariff drafting practices could result from such a finding.

We believe that the better way of handling the tariff limitations described in (b) and (c) is on a case-by-case basis. While no presumption for or against their lawfulness will be created, we shall have the Consumer Unit of the Tariff Examining Branch of the Commission's Bureau of Traffic scrutinize these proposals. We shall not require that written justification accompany every tariff. However,

[13]Pertinent restrictions are those "[W]hich have no foundation in the underlying certificated authority held by the carrier and which provide that rates do not apply on:

(b) shipments originating at or destined to certain named points;
(c) shipments received from or delivered to *named* connecting carriers;
(g) shipments not delivered by the publishing carrier; ***."

when in the judgment of the members of the staff of that unit a tariff limitation of this type appears unreasonable, justification for that rule will be required from the publishing carrier or agent. Such data can then be examined by the Commission's Suspension and Fourth Section Board before the tariff is to take effect. If warranted, the tariff will be suspended. Compare, *Drug & Toilet Prep. Traf. Conf.—Joint Petition*, 124 M.C.C. 54, 63-64 (1975). It should be possible as a result of this more flexible approach to develop objective principles, through subsequent case disposition clearly defining those situations wherein the considered provisions may be employed, to the obvious benefit both of those responsible for preparing tariffs, and of the shipping public.

While it is submitted by the Regular Common Carrier Conference that it is inappropriate to consider in this proceeding the remaining restrictions found unlawful in our prior report, none of the parties have provided information indicating any need for the retention of such terms in tariffs. It is readily apparent that joint-line operations could be hindered as a result of restrictions precluding the applicability of through rates to

(d) shipments of named commodities;
(e) less-than-truckload shipments;
(f) shipments which fail to meet unreasonable minimum weight requirements; and
(h) shipments which fail to meet unreasonable packaging requirements.

Contrary to the contentions of petitioners, the fact that provisions having the effect of the restrictions set forth in (d) and (e) have been found unlawful on general regulatory principles in prior proceedings in no way precludes them from being found within the purview of the regulation here under interpretation. Criteria relating to the question of what constitutes unreasonable minimum weight restrictions have been established in the decision in Ex Parte No. MC-77,[14] and in our prior report in this proceeding it was clearly explained that the restrictions in category (h) above are essentially blanket prohibitions against handling any packaged item not in conformity with specifications appearing in a tariff. In these circumstances there should be no substantial difficulty in complying with the requirement that these and the other objectionable terms discussed in this report be deleted from carrier tariffs.

At this point it is necessary to note that to the extent carriers are not required to remove various restrictions from their tariffs we in-

[14]See 111 M.C.C. 151, *supra*, at pages 170-173.

tend no waiver of the right to re-evaluate our position concerning the continuing acceptability of such provisions. Additionally, the parties are advised that upon bringing their tariffs into conformity with this decision by modifying or deleting certain provisions, they may not directly or indirectly again limit their service in the manner considered and found improper herein, and any proposed revisions of tariffs or supplements thereto which include those restrictions found unlawful in this proceeding will be subject to rejection. Carriers which do not presently maintain such restrictions are further advised that this decision, insofar as it recognizes a limited right to restrict their tariffs, is not meant as an invitation to diminish their service in accordance with its terms, and any such proposals will be closely scrutinized.

We believe that our action in this proceeding is necessary and reasonable and that it is an exercise of the power granted in section 208(a) of the act, inasmuch as it is tailored to deal with the particular aspects of traffic selectivity which appear to diminish most the efficiency of interline motor common carrier operations. It is sufficiently limited in its effects so that neither carriers nor shippers should be burdened by increased terminal handling costs such as would occur if substantial new joint-line service were required. Neither should compliance with the terms of this decision by carriers and tariff bureaus involve the wholesale revision of tariff format with its attendant cost and service complications. While it is possible that more questions may arise if additional joint-line operations flow from this action, with respect to division of rates and property damage liability matters, the regulatory scheme established in the act provides ample means for the resolution of such problems.

We would finally note that throughout the foregoing consideration of the involved issues and the explanation of our response to them, no distinction has been made between tariffs maintained by bureaus and those which are privately published. This is not inadvertent, for we are of the opinion that the principles stated are applicable to either. Likewise, there has been no differentiation in our discussion between regular and irregular-route motor common carrier, or between tariffs maintained by general commodities and specified commodities carriers. While there is less interline service in irregular-route operations and in operations by carriers authorized to transport specified commodities, it nevertheless remains that to the extent these carriers hold out through route availability, they may not arbitrarily or in a discriminatory manner limit the traffic moving

over such routes contrary to the regulation at 49 CFR 1307.27(k), as interpreted here.

SUMMARY

This proceeding, initiated in response to compliance reports submitted by tariff bureaus in conformity with the decision in 111 M.C.C. 151, *supra*, has been challenged on petition on a number of procedural and substantive grounds. As indicated above, the procedural contentions of respondents are felt to be of little consequence, or else have been satisfied by the steps taken in the disposition of these petitions. The substantive matters have been considered further in the light of factual representations by the parties on further proceedings. Our interpretive modifications herein are significantly narrower than those in our report in 119 M.C.C. 691, *supra*; nevertheless, they are felt to be of sufficient scope to resolve the major traffic selectivity problems which arise in the context of multiline, through common carrier service in the transportation of traffic moving at class or column commodity rates.

In capsule form our decision in its substantive aspects provides:

(1) that motor common carriers of property will be required to modify outstanding tariff restrictions which are without foundation in their underlying authority and which provide that joint rates do not apply on operations involving more than two carriers, to allow for the participation of at least three carriers in a given movement at through rates;

(2) that restrictions without foundation in a carrier's underlying authority providing that single-factor rates do not apply on (a) shipments not delivered by the publishing carrier; (b) shipments of named commodities; (c) less-than-truckload shipments; (d) shipments which fail to meet unreasonable minimum weight requirements; and (e) shipments which fail to meet unreasonable packaging requirements, are required to be removed from motor common carrier tariffs;

(3) that after the effective date of this decision proposed new restrictions having an effect similar to that of the provisions herein required to be removed or modified will be subject to rejection or possible suspension action; and

(4) that proposals to include other specific restrictions providing that joint rates do not apply on shipments originating at or destined to certain named points, or interlined with named connecting carriers in new tariff filings, tariff amendments, or supplements, will be considered on a case-by-case basis subject to our suspension procedures, and will be scrutinized carefully by the Tariff Examining Branch of the Bureau of Traffic, which may require justification before such a restriction is approved.

In view of our having proceeded in this manner, the major contentions of respondents in their pleadings and at the informal conference would appear to be effectively rendered moot. To the extent

our action in this report is not so dispositive of their representations, their petitions will be denied in our findings below.

Several ancillary matters not specifically mentioned above remain for consideration. First, the regulation construed here is as broad as a carrier's obligation under the act to serve the public without discrimination and to the full extent of its operating authority. Thus, it would appear that a determination as to its applicability to any particular practice whereby carriers limit the scope of their operations through tariff restrictions may be accomplished by means of interpretive proceedings such as this one, or in separate proceedings having as their subject a consideration of the lawfulness of a given practice in light solely of statutory requirements or of other pertinent regulations. This renders it unnecessary for us to attempt to list specifically in this report all of the tariff restrictions which might conceivably fall within its scope. Further, we will continue to monitor the effect of tariff limitations which relate to the provision of interline service, and will act as we have done here if further abuses become apparent subsequent to the entry of this decision. Finally, our conclusion above regarding the impracticalities attendant upon a wholesale modification of motor common carrier operations by requiring the initiation of "open routing" is not meant as an indication that we are abandoning efforts to obtain statutory authority to compel carriers to provide joint-line service. Such authority would in the final analysis be the best means of insuring service availability with respect to certain traffic and certain areas. Insofar as it requires affirmative action by carriers, through the modification of certain tariff provisions and the deletion of others, the parties will be afforded until 120 days from the date of this order to conform their tariffs with its terms.

FINDINGS

On further consideration we find that the interpretations in our prior report in the above-captioned proceeding, printed at 119 M.C.C. 691, require modification as set forth above; that the petitions seeking reconsideration of our prior decision, to the extent the relief sought is not granted are denied; that the regulation codified at 49 CFR 1307.27(k) should be construed and interpreted in a manner consistent with the conclusions in this proceeding as modified on further consideration herein and that such construction and interpretation are reasonable and necessary to the effective enforcement of the provisions of the national transportation policy and

part II of the Interstate Commerce Act, as amended; that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969; that motor common carriers of property and their tariff publishing agents should be required to bring their tariffs into conformity with the terms of this decision within 120 days from the service date of this order; and that this proceeding should be discontinued. An appropriate order will be entered.

COMMISSIONER O'NEAL, concurring in part:

I approve the report of the majority with two exceptions. The prior Commission report in this proceeding at 119 M.C.C. 691 at 704 and 705 found unlawful the following tariff restrictions, among others, which provide that single-factor through rates do not apply on:

(b) shipments originating at or destined to certain named points;
(c) shipments received from or delivered to *named* connecting carriers.

The majority in this proceeding has eliminated the prohibition imposed in the earlier report against the publication of these tariff restrictions. The rationale is that the publication of restrictions against named origins or destinations is necessary to allow a carrier to avoid inefficient operations, and that the restriction against named interlining carriers helps to protect a carrier from having to deal with another carrier which is not financially sound.

The report states that the Consumer Unit of the Tariff Examining Branch will examine these restrictions on a case-by-case basis, but creates no presumption of their unlawfulness and requires no written justification of them.

This approach ignores the great potential for unjust discrimination in allowing carriers to restrict their single factor through rates against *named* origins and destinations and *named* interlining carriers. The essence of common carriage is that a carrier be required to provide nondiscriminatory service within the full scope of his authority. Restrictions against named origins and destinations cut against the grain of this basic concept. Although a carrier would still be obliged to provide service under the majority's decision, he could apply much higher combination rates to the named point. Allowing restrictions against named interlining carriers would appear to give larger carriers a potent weapon to use in dealing with smaller interlining carriers.

A preferable course of action, were it felt necessary to modify the absolute prohibition against such restrictions contained in the earlier report, would have been to adopt a presumption that these restrictions are unlawful and require carriers to eliminate any such outstanding restrictions unless the carrier submits a written justification for the restriction rebutting the presumption of unlawfulness. Any tariff item published in the future containing such a restriction should be accompanied by a written justification sufficient to rebut a presumption of unlawfulness.

It is worth noting also that the majority's decision undercuts the Commission's effort over the past few years to obtain from Congress the power to require the establishment of through rates and joint rates by motor carriers. If carriers are allowed to restrict the geographical points of service and select the carriers with whom they will interline, the utility of giving the ICC additional powers over through routes and joint rates would appear to be greatly diminished.

APPENDIX

Supplemental environmental threshold assessment survey

I. *Introduction*

An environmental threshold assessment survey (TAS) has been prepared in the above-entitled proceeding, and by order served October 25, 1974, it was determined that no environmental impact statement need be issued in the proceeding as it does not represent a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969. The order provided for service of the TAS on all parties to the proceeding and afforded an opportunity to comment on the environmental findings. Comments to the TAS have been received (1) from the Central and Southern Motor Freight Tariff Association, Inc., (2) from the Midwest Motor Freight Bureau, (3) from the Rocky Mountain Motor Tariff Bureau, Inc., (4) from the Regular Common Carrier Conference of American Trucking Associations, Inc., (5) from the Middle Atlantic Conference, (6) jointly from the Central States Motor Freight Bureau, Inc., The Eastern Central Motor Carriers Associations, Inc., and Southern Motor Carriers Rate Conference, and (7) jointly from the Drug and Toilet Preparation Traffic Conference, National Small Shipments Traffic Conference, and Eastern Industrial Traffic League.

Although the comments received present no cause to modify the ultimate determination in the TAS, there are certain factors which require further elaboration.

At the outset it is recognized that the Commission found that a majority of regulated motor common carriers are generally rendering a complete and comprehensive transportation service, yet certain carriers utilize tariff restrictions as a means of imposing limitations on the service they offer.

II. *Environmental impacts*

The TAS recognizes two areas of relevant environmental impact. None of the commenting parties has suggested that other environmental impacts might occur. In

reference to socio-economic impact, it is noted that the Council on Environmental Quality's guidelines identify socio-economic impact as a secondary effect which often must be considered in an impact statement or threshold assessment. The socio-economic impact in the instant proceeding is concerned with ensuring that Commission action (or inaction) does not adversely affect community development processes. This factor is separate and distinct from a discussion of the relative merits of this action as it relates to assessing the economic consequences that individual carriers and shippers might experience. This latter issue is a question which is more properly pertinent to an adjudication of the proceeding on the merits.

Keeping this distinction in mind, the action of the Commission is not intended to actively encourage rural development over urban or metropolitan development. The TAS recognizes a host of factors which a particular firm may consider in a decision to locate in a particular geographic region, and although the availability of a responsive transportation service is a vital element, it is not the sole determining factor. The Commission report implicitly recognizes that by eliminating the involved tariff restrictions, shippers will be better able to make their location determination with assurance that discrimination in motor carrier transportation services will not occur as a result.

While the TAS recognizes that some degree of excess circuity may result from the elimination of the involved tariff restrictions, no party has submitted cogent evidence which would indicate that excessive circuitous operations will result causing a significant adverse effect on fuel and natural resource consumption. While an increase in the number of carriers participating in the through movement will occur in certain circumstances, the more likely results will be perhaps a multiline haul over the same route where a single-line haul may be available. For example, where a single-line service is available from Chicago to Miami, the traffic might move in a multiline haul via Louisville and Atlanta. This might result in increased handling and transit time, but not a significantly greater circuitous operation. It should be noted that the various parties most recently had the opportunity to present evidence to show the expected amount of excess circuity in comments to the TAS. No such evidence was forthcoming. If these tariff limitations are declared invalid, the Commission will continue to monitor the effect this will have on transportation services. If substantial circuitous operations do result, this proceeding could be reopened and the rules modified as appropriate.

III. *Alternatives*

1. *No action.*—The involved service limitations will be allowed to continue in individual carrier tariffs. Certain shippers, especially those located in rural and relatively unaccessible areas, may continue to have difficulty in having available responsible motor carrier transportation services. Circuitous operations, to the extent they would result from the interpretation, will be avoided. This would have a beneficial impact on fuel conservation and natural resource consumption. However, this beneficial impact will be insignificant because no substantial increase in circuitous operations is expected.

2. *Limit allowable circuity to 20 percent.*—The Commission should consider qualifying the regulations to prohibit a multiline movement which would be more than 20 percent of the distance required by an available single-line or superior movement. This could be accomplished by amending the rules at the present time or by waiting for a specified period of time while the new rules are in effect, in order to determine whether the predictions of excessive circuitous operations materialize. The beneficial

environmental effect of this alternative would be to eliminate the possibility of excessive circuity. However, there may be considerable difficulty in enforcing such a limitation, because the total amount of circuity could not be determined until all carriers involved in the movement have participated. Moreover it is reasonable to expect shippers to view this matter carefully. Circuity of operations, especially by more than 20 percent, results in higher costs and slower transit time. Shippers are aware of this and can protect themselves by directing service over the shorter routes.

3. *Allow tariff limitations which state that joint rates do not apply on four-line hauls.*—Many of the tariff limitations complained of providing for the nonapplicability of joint rates on more than two-line hauls. Another alternative to consider is to allow limitations in tariffs to movements consisting of more than four-line hauls. This alternative would eliminate many of the abusive practices while retaining a measure of assurances that excessive increases in handling time and circuity would not occur.

4. *Continue to seek legislative authority to allow this Commission to order the establishment of through routes and joint rates.*—This Commission has recommended to Congress that it be granted legislative authority to order the establishment of through routes and joint rates. At the present time, these are permitted but not required. This authority would greatly help the Commission in alleviating the small shipment problem. As noted in the body of the report, legislation to this effect has again been recommended to Congress and introduced.

Until such legislation is passed, however, the Commission can adopt the regulations envisioned in order to alleviate the problem at least in the interim.

IV. *Environmental determination*

Based upon an examination and review of the comments received to the threshold assessment survey, no cause has been shown to warrant modification of the determination made in the TAS that this action will not have a significant impact on the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. section 4321, *et seq.*, and preparation of a detailed environmental impact statement, therefore, is not required.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 19th day of January 1977.

Ex Parte No. MC-77 (Sub-No. 1)

RESTRICTIONS ON SERVICE BY MOTOR COMMON CARRIERS
(Compliance Reports and Interpretations)

Investigation of the matters and things involved by this proceeding having been made, and this Commission, on the date hereof, having made and filed its report herein on further consideration, containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That the record made herein be, and it is hereby, reopened, and the pleadings identified as verified statements which have been submitted in conjunction with the petitions for reconsideration described in the body of this report be, and they are hereby, accepted into evidence; and that the transcript of the informal conference held herein on November 15, 1974, be, and it is hereby, incorporated into the record in this proceeding.

It is further ordered, That the interpretations in the prior report in the above-entitled proceeding, printed at 119 M.C.C. 691, to the extent inconsistent herewith, be, and they are hereby, modified in conformity with those set forth in our report on further consideration herein.

And it is further ordered, That the petitions for reconsideration to the extent the relief sought is not granted by our action herein, be, and they are hereby, denied.

By the Commission.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX E

STATUTORY PROVISIONS

INTERSTATE COMMERCE ACT:

Section 15(3), 49 U.S.C. § 15(3):

> The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by railroad subject to this chapter and common carriers by water subject to chapter 12 of this title, or the maxima or minima, or maxima or minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. . . .

Section 204(a)(1), 49 U.S.C. § 304(a)(1):

> (a) It shall be the duty of the Commission—
>
> (1) To regulate common carriers by motor vehicles as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

INTERSTATE COMMERCE ACT:

Section 216(a), 49 U.S.C. § 316(a):

> (a) It shall be the duty of every common carrier of passengers by motor vehicle to establish reasonable through routes with other such common carriers and to provide safe and adequate service, equipment, and facilities for the transportation of passengers in interstate or foreign commerce; . . .

Section 216(c), 49 U.S.C. § 316(c):

> (c) Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carrier parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers . . . .

REGULATIONS:

Section 1307.27(k)(1), 49 U.S.C. § 1307.27(k)(1):

> Tariffs must contain only rates, charges, and related provisions that cover services in strict conformity with each carrier's operating authority. No provision may be published in tariffs, supplements, or revised pages which results in restricting service to less than the carrier's full operating authority or which exceed such authority. Tariff publications containing such provisions are subject to rejection or suspension for investigation.

Nos. 77-1613 and 77-1727

In the Supreme Court of the United States

OCTOBER TERM, 1977

EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

MARK L. EVANS,
General Counsel,

HENRI F. RUSH,
Associate General Counsel,

DAVID POPOWSKI,
Attorney,
Interstate Commerce Commission,
Washington, D.C. 20423.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-4)[1] is reported at 571 F. 2d 784. The opinion of the Interstate Commerce Commission (Pet. App. C-1 to C-18)

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[1]"Pet. App." refers to the separately bound appendix in No. 77-1613.

is reported at 119 M.C.C. 691. The opinion of the Commission on reconsideration (Pet. App. D-1 to D-29) is reported at 126 M.C.C. 303.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1978. A petition for rehearing was denied on March 30, 1978. The petitions for a writ of certiorari were filed on May 11, 1978, and May 18, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 2350 and 1254(1).

QUESTION PRESENTED

Whether the Interstate Commerce Commission exceeded its authority by requiring motor carriers to eliminate from their tariffs certain provisions denying shippers the benefit of joint rates on cargo shipped by more than two carriers over through routes.

STATEMENT

The Interstate Commerce Commisssion determined that certain tariff provisions limiting the application of joint rates to cargo shipped by no more than two carriers over through routes[2] conflicted with a Commission regulation (49 C.F.R. 1307.27(k)(1) (1974)) which provides that no carrier shall publish a tariff "which results in

[2]A "through route" is "an arrangement, express or implied, between connecting [carriers] for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another." *Thompson* v. *United States*, 343 U.S. 549, 556. A "joint rate" is "a combined charge for the entire journey of a shipment of cargo over the lines of several carriers from origin to destination. * * * Generally speaking, joint rates for a shipment are cheaper than the sum of the local rates." *McLean Trucking Co.* v. *United States*, 346 F. Supp. 349, 351 (M.D. N.C.), affirmed, 409 U.S. 1121. Joint rates are not always available even though carriers offer through route services. *Thompson* v. *United States*, *supra*, 343 U.S. at 556.

restricting service to less than the carrier's full operating authority." The substance of the Commission's order is that motor carriers must eliminate outstanding tariff restrictions that provide that joint rates are inapplicable to operations involving more than two carriers, and that carriers must allow shippers the benefit of less expensive joint rates when their cargo is transported by no more than three carriers over through routes.

The Commission found that tariff provisions confining joint rates to two-carrier operations had caused serious deficiencies in service to rural areas (Pet. App. D-9 to D-10, D-18 to D-20). The Commission determined that the two-carrier limitation has had an "embargo effect" on traffic in certain areas because rural shippers, denied the benefit of lower joint rates, have found transportation expenses to be prohibitively high.[3] The Commission also determined that, if shippers could obtain transportation services from three carriers operating over a through route at the relatively lower joint rate, adequate service could be provided for shippers in all geographical areas, without substantial cost increases for the carriers (Pet. App. D-20). And the Commission indicated that, to the extent that cost increases were experienced by the carriers, rates could be increased (*ibid.*). Accordingly, the Commission ordered motor carriers to eliminate two-carrier restrictions from their tariffs.

[3]Under the two-carrier limitation, if three or more carriers were required to complete a particular shipment, either a joint rate plus a local rate or the much higher local rates of all participating carriers were applicable. Shippers in rural areas frequently depended upon interconnections between three separate carriers to complete their shipments, and thus were exposed to substantially higher transportation costs.

The Commission emphasized that it was not compelling carriers to establish "through routes" that would not otherwise exist. The Commission acknowledged that it does not have authority to "force motor carriers to enter into interline arrangements," and that carriers were "free to choose whether or not to initiate interline service" (Pet. App. D-15). However, "to the extent [that] these carriers hold out through route availability," the Commission determined that they could not adopt unreasonable limitations on the availability of joint rates which resulted in a virtual embargo of transportation for shippers in isolated areas (Pet. App. D-23 to D-24). The Commission concluded that "by filing a joint line tariff, each carrier accepts the right of the Commission to prescribe the proper parameters of the tariff publication. * * * We hold, therefore, that the Commission has power to impose reasonable conditions on the services offered by carriers who choose to exercise their right to engage in interline operations" (Pet. App. D-16).[4]

On a petition to review the order of the Commission, the court of appeals held that the Commission's order is a proper exercise of its statutory authority, and that its administrative discretion had not been abused (Pet. App. A-1 to A-4).

ARGUMENT

The decision of the court below is correct, and it does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

[4]The Commission thus recognized that carriers that publish joint line tariffs and routing guides setting forth the points between which such carriers hold themselves out to provide service, including the points at which they interchange with other carriers, have established, in the words of petitioners here (see Pet. No. 77-1613, p. 3), "a nationwide network of through route service * * *".

1. In disapproving the two-carrier limitation in joint line tariffs, the Commission exercised its broad authority under Sections 208(a), 204(a)(1), and 204(a)(6) of the Interstate Commerce Act, as added, 49 Stat. 552, 546, and amended, 49 U.S.C. 308(a), 304(a)(1) and 304(a)(6). The Commission may regulate common motor carriers and "establish reasonable requirements with respect to continuous and adequate service" (49 U.S.C. 304(a)(1)). The Commission enjoys ancillary power to make "all necessary orders" and to adopt "rules, regulations and procedure[s]" to implement its regulatory authority (49 U.S.C. 304(a)(6)).[5] And the Commission is further empowered to attach to each certificate of public convenience and necessity granted to a motor carrier "such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require" (49 U.S.C. 308(a)(1)). Those powers are to be exercised by the Commission "to promote safe, adequate, economical, and efficient service * * *", as specified in the National Transportation Policy, 54 Stat. 899, preceding 49 U.S.C. 1.[6]

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[5]Regulations based on permissible public interest goals fall within the general rule-making authority of an administrative agency so long as they are a reasonable means to achieve such goals. *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369. See also, *Federal Communications Commission* v. *National Citizens Committee for Broadcasting*, No. 76-1471, decided June 12, 1978, slip op. 19.

[6]As this Court noted in *American Trucking Associations, Inc.* v. *Atchison, Topeka & Santa Fe Ry., Co.*, 387 U.S. 397, 421, the declaration of national transportation policy governs the Commission in its administration and enforcement of all provisions of the Act and is " 'the yardstick by which the correctness of the Commission's actions will be measured.' "

The disapproval of the two-carrier limitation, found by the Commission to result in less than adequate service to certain classes of shippers, was a proper exercise of the discretionary powers granted to the Commission by Congress. The court of appeals therefore properly enforced the Commission's order. See *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 748-749:

> The standard of judicial review for actions of the Interstate Commerce Commission * * * is well established by the prior decisions of this Court. We do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported.

2. Petitioners contend (Pet. No. 77-1613, pp. 5-9; Pet. No. 77-1727, pp. 10-17) that the action of the Commission is prohibited by Section 216(c) of the Interstate Commerce Act, as added, 49 Stat. 558, and amended, 49 U.S.C. 316(c). That section provides that motor carriers "may establish reasonable through routes and joint rates * * * with other such carriers * * * and just and reasonable regulations and practices in connection therewith." Petitioners contend that this provision grants them discretion to establish through routes and joint rates as they see fit, and that the Commission cannot "construct" routes that the carriers have not themselves initiated.

The Commission recognized, however, that it does not have authority to compel carriers to establish through routes (Pet. App. D-15). The Commission nonetheless determined that where, as here, the carriers have

established interline operations, and have held themselves out to shippers as providing such through services, their operations over these established routes are subject to reasonable terms and conditions as prescribed by the Commission in the public interest (Pet. App. D-14 to D-24). See *McLean Trucking Co.* v. *United States*, 346 F. Supp. 349 (M.D. N.C.), affirmed, 409 U.S. 1121.[7]

Petitioners also argue that *Thompson* v. *United States*, 343 U.S. 549, is inconsistent with the action of the Commission here. The facts in *Thompson*, however, were quite different from those presented here. In *Thompson* the issue was whether a through route of any kind existed. This Court held that no through route existed because the carriers did not "hold themselves out as offering through transportation service" and did not enter into any such "course of business." The Court noted that "[t]hrough routes * * * ordinarily are, established by the voluntary action of connecting carriers" and that through carriage "implies the existence of a through route whatever the form of the rates charged for the through service." 343 U.S. at 554, 557. Here, as the Commission explicitly found, the carriers did voluntarily enter into through carriage *service* and held themselves out as providing such service (even though joint *rates* were offered only on a limited, two-carrier basis). That finding

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[7]Petitioners do not dispute the authority of the Commission to regulate transportation on through routes (see Pet. No. 77-1613, pp. 8-9; Pet. No. 77-1727, p. 12). Thus, the findings of the Commission (which were affirmed on appeal) that through routes had been established because, *inter alia*, the tariffs filed by petitioners and their related routing guides set forth through route services, should not be subject to further review in this Court. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636; *United States* v. *Allegheny-Ludlum Steel Corp.*, *supra*, 406 U.S. at 748-749.

was adopted by the court of appeals.[8] Petitioners simply disregard the distinction between through service and through rates. *Thompson* involved only a through service problem; the present case concerns the rates to be charged for established through services. See also *Associated Truck Lines, Inc.* v. *United States*, 304 F. Supp. 1094 (W.D. Mich.), affirmed, 397 U.S. 42; *McLean Trucking Co.* v. *United States, supra*, both of which upheld the Commission's regulation of unreasonable practices that had impeded carriage over through routes. As this Court explained in *American Trucking Associations, Inc.* v. *Atchison, Topeka & Santa Fe Ry., Co.*, 387 U.S. 397, 410-411, in the course of holding that Section 216(c) of the Act is not a bar to a Commission order similar to that involved here:

> [W]e cannot accept arguments based upon arguable inferences from nonspecific statutory language * * *. For example, §216(c), 49 U.S.C. §316(c), authorizes the railroads to enter into voluntary arrangements for through routes and joint rates with motor carriers. There is no Commision power to compel the railroads to do so, and it is argued that from this we should derive a congressional intent that the ICC may not compel the railroads to furnish services to the motor carriers in any circumstances. There is no basis for this vast leap from a particular authorization to a pervasive prohibition [of ICC regulation].

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[8]Petitioners argue (Pet. No. 77-1613, p. 6) that appellate counsel for the Commission advanced certain illustrative contentions in oral argument on appeal which were equivalent to the "construction" by counsel of through routes. But the findings and conclusions of the Commission, not the arguments of counsel, are the subjects of appellate review (*Federal Trade Commission* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 246-250), and the findings and conclusions of the Commission regarding the existence of through routes in actual operation here were sufficient to support its determination.

3. Petitioners contend that the limitation of joint rates to transportation by only two carriers is reasonable and should have been approved by the Commission (Pet. No. 77-1613, p. 10). But the Commission specifically found that the two-carrier limitation worked a serious hardship on shippers in isolated areas and that three carriers were needed to afford adequate service and efficient movement of their cargo (Pet. App. D-20). These factual inferences, drawn by the agency after a full hearing and affirmed by the court of appeals, were within the Commission's authority and are not arbitrary or capricious. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, No. 76-419, decided April 3, 1978, slip op. 36.

Petitioners also argue that through services, provided by three carriers at joint rates, may give rise to increased costs (Pet. No. 77-1613, p. 10). But the Commission found that any cost increase would be insignificant, and that the carriers, subject to Commission approval, might seek rate increases to recover increased operating expenses (Pet. App. D-20).

Finally, petitioners argue (Pet. No. 77-1613, p. 10) that the Commission's three-carrier requirement will force carriers to share liability for lost and damaged goods with other carriers who are of "unknown or questionable responsibility." The matter of interconnection with financially unsound carriers is the subject of a different tariff provision, which the Commission has determined may be acceptable when reviewed in the future on a case-by-case basis (Pet. App. D-21 to D-22). The order here does not purport to determine the general propriety of tariff provisions intended to assure the financial responsibility of interconnecting carriers, and petitioners' objection therefore is groundless.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MARK L. EVANS,
General Counsel,

HENRI F. RUSH,
Associate General Counsel,

DAVID POPOWSKI,
Attorney,
Interstate Commerce Commission.

JUNE 1978.

DOJ-1978-06

No. 77-1613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC.
MIDDLE ATLANTIC CONFERENCE
NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.
NEW ENGLAND MOTOR RATE BUREAU, INC.
NIAGARA FRONTIER TARIFF BUREAU, INC.
ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

BRYCE REA, JR.
DAVID H. COBURN
918-16th Street, N.W.
Washington, D.C. 20006
(202) 785-3700
Counsel for Petitioners

OF COUNSEL:

REA, CROSS & AUCHINCLOSS
700 World Center Building
918-16th Street, N.W.
Washington, D.C. 20006

August 11, 1978

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REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

INTRODUCTION

This reply brief is filed in response to the joint brief of Respondents United States of America and Interstate Commerce Commission (Federal Respondents). Herein, Petitioners will rebut the primary contentions upon which Respondents ground their opposition to the above-referenced petition for a writ of certiorari (Petition).

REPLY ARGUMENT

This case raises the question of whether the Interstate Commerce Commission (ICC) can accomplish indirectly by regulatory fiat what all parties agree it cannot accomplish directly; to wit, whether the Commission exceeded its authority when it ordered motor common carriers of property to establish new through routes and joint rates with one another. The predicate of the argument made by Federal Respondents is that the through route service which Petitioners claim the ICC has established pre-existed the ICC's order. On this predicate, the Federal Respondents distinguish *Thompson* v. *United States,* 343 U.S. 549 (1952), urging that, "In *Thompson* the issue was whether a through route of any kind existed," while here "the carriers did voluntarily enter into through carriage *service* and held themselves out as providing such service (even though joint *rates* were offered only on a limited, two-carrier basis)." (Resp. Br., p. 7). Respondents further urge that "*Thompson* involved only a through service problem; the present case concerns the rates to be charged for established through services." (Resp. Br., p. 8).

But the issue here is precisely the extent to which through routes existed prior to the Commission's order. And the resolution of the issue is inseparable from the question of the rates to be charged for through services. Prior to the Commission's order, the petitioning carriers held out through service—i.e., through routes—but only on a limited basis. The indicia of the limit on their through service was their tariff limiting application of joint rates to two carrier hauls. That tariff manifested a decision among petitioning carriers *not* to offer joint rates or through

routes on hauls involving more than two carriers. Hence, the situation which pre-existed the Commission's order here was precisely that which existed in *Thompson* prior to the Commission's order—physically connecting carriers offering to the shipping public, not through service, but a combination of separate and distinct single-line services.

Thompson is thus right on point. The Court there held that a through route is manifested by the presence of a joint "holding out", i.e., an agreement between physically connecting carriers for the continuous carriage of goods between points on the line of one and points on the line of the other. This Court also held that mere physical interconnection of single-line services would not establish a through route. *Thompson* held that:

> The logical conclusion . . . [of such reasoning would be] that through routes exist between all points throughout the country wherever physical rail connections are available. 343 U.S. at 559.

There was *no agreement* between the physically connecting railroads in *Thompson* and hence this Court found that there was no through route. Here, there was likewise *no agreement* among carriers sharing common interchange points to offer anything other than limited, two carrier through routes. The Commission's order effectively forces carriers to make a new agreement; forces carriers to offer joint rates on three carrier hauls and thereby to "hold out" new three carrier through service. The order therefore exceeds the Commission's statutory authority.

The predicate for the argument of Federal Respondents thus shattered, their remaining contentions are easily disposed of.

Federal Respondents urge that Sections 208(a), 204(a)(1) and 204(a)(6) of the Act,[1] authorize the Commission to order the expansion of existing motor common carrier through routes and to thereby establish new through routes. However, these generalized grants of authority cannot nullify the specific provisions of Section 216(c) which provides only that motor common carriers of property "*may* establish reasonable through routes and joint rates . . . with other such carriers. . . ." See *Smith Bros. Revocation of Certificate,* 53 M.C.C. 465 (1942); *Removal of Truckload Lot Restrictions,* 106 M.C.C. 455 (1958). Section 208(a) merely grants the Commission authority to attach terms and conditions to certificates of public convenience and necessity and such certificates do not and cannot require carriers to provide through route service. And as shown in the petition, the generalized grant of regulatory authority contained in Section 204 is restricted by the limits of the regulatory system—i.e., by the limitation in Section 216 against Commission mandated through routes.

Respondents' reliance on *American Trucking Associations, Inc.* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 387 U.S. 397 (1967), as justification for the Commission's action is misplaced. In that case, the authority of the Commission over through routes was not at issue. The railroads published tariffs holding themselves out to the public to render piggy-back service, i.e., to transport highway trailers on flatcars. However, the service was not available to motor carriers. The Commission held that the railroads' restriction against such use unlawfully discriminatory against motor carriers.

[1] 49 U.S.C. §§ 308(a), 304(a)(1) and 304(a)(6).

The railroads argued to this Court that the effect of the Commission's decision was to compel them to enter into through routes with motor common carriers in contravention of Section 216(c) of the Act. This Court answered that the Commission had not required the railroads to enter into through routes, but only to accept freight tendered to them by motor common carriers under the same terms and conditions as they accept freight tendered by anyone else. What the Commission did here was to require that carriers establish through routes and joint rates which, in the words of this Court, "is quite different."

Finally, the Federal Respondents urge that the ICC did not err because its action was reasonable and warranted by the evidence. The simple answer to this contention is that it is irrelevant. If the ICC lacked jurisdiction to issue its order, and that is the sole issue raised by the petition, then the order cannot stand.

Respectfully,

BRYCE REA, JR.
DAVID H. COBURN
918-16th Street, N.W.
Washington, D.C. 20006
(202) 785-3700
Counsel for Petitioners

OF COUNSEL:

REA, CROSS & AUCHINCLOSS
700 World Center Building
918-16th Street, N.W.
Washington, D.C. 20006

August 11, 1978


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